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Supreme Court, U
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Case No.

IN THE

Supreme Court of the United States

CATHY D. BROOKS-McCOLLUM & EMERALD RIDGE SERVICE CORPORATION,

Petitioner(s)

v.

State Farm

Respondent(s)

On Petition For Writ of Certiorari
To The United States Court Of Appeals For The Third Circuit

PETITION FOR WRIT OF CERTIORARI

Cathy D. Brooks-McCollum (Pro Se)

25 Rock Hollow Court
Elkton, MD 21921
(302) 521-1241

QUESTIONS PRESENTED FOR REVIEW

1. Did the US Courts violate the Rooker-Feldman doctrine and that of 28 U.S.C. §1254(1) and 28 U.S.C. § 1257?

LIST OF ALL PARTIES TO PROCEEDING IN THE THIRD CIRCUIT COURT OF APPEALS

1. State Farm Insurance Company
2. Cathy D. Brooks-McCollum
3. Emerald Ridge Service Corporation

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STATEMENT OF JURISDICTION

This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1254(1) and 28 U.S.C. § 1257.

Petition For Rehearing was dated 5/3/2010, Filed 5/3/2010 and Denied.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The equal protection clause of the Fourteenth amendment to the United States Constitution provides in pertinent part:

> No state shall....deny to any person within its jurisdiction the equal protection of the laws.

The equal protection clause of the Ninth amendment to the United States Constitution provides in pertinent part:

> The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

The equal protection clause of the Seventh amendment to the United States Constitution provides in pertinent part:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

STATEMENT OF THE CASE

A. Facts Giving Rise To This Case

Congress has conferred jurisdiction to review a state court's decision only on the Supreme Court, see 28 U.S.C. § 1257, lower federal courts lack the power to decide claims in which "the relief requested . . . requires determining that the state court's decision is wrong or . . . void[ing] the state court's ruling."

Petitioner brings this claim stating that the US Courts violated the Rooker-Feldman doctrine. Furthermore, in pursuant to Supreme Court Rule 10 Petitioner states that the United States Court of Appeals has entered a decision in conflict with the decision of its court and that of the United States Supreme Court, which conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;

This is a an appeal from the US District Court For The State Of Delaware and the US Court Of Appeals For The Third Circuit, where Petitioner believes that both courts issued Orders in direct conflict with that of the Rooker-Feldman doctrine. The US Court Of Appeals For The Third Circuit and the US District Court For Delaware, stated in its' very own Orders/Opinions App.1a-56a that the issues raised in this case are identical to those raised by Petitioner in the proceedings in this court.

1. The District Courts

App.21a, [footnote 3] the District Court improperly states, *"Based upon the content of her affidavit, it may be that Plaintiff wishes to voluntarily dismiss her case or that she believes the case should be remanded. Plaintiff, however, did not request dismissal. And, because the case was originally filed in this Court and not State court, a remand is procedurally improper."* This case against these

respondents was originally filed in *Delaware Superior Court For The State Of Delaware, Civil Action 04C-03-075-1-CV, in 2004* prior to filing this case in the US Courts. Furthermore, Petitioner in this case informed the Delaware Chancery Court in Civil Action *Brooks-McCollum v. Shareef, No. Civ. A. 147-N (Del. Ch.) filed Jan. 2, 2004* currently pending; that she was adding these Respondents to the proceedings in this court in March 2004, as the Chancery Court validated in its Order, located at App.52a, which states *"On March 9, Petitioners filed a self-styled amended complaint to add breach of contract claims against State Farm Insurance Company ("State Farm") and to assert various challenges to the identity of the properly elected directors of Emerald, as well as several other new claims.."* Wherefore, the state claims pending also includes these Respondents, and meets the threshold that these Respondents were in-state prior to being before any US Courts. All courts being aware that these issues were before a state tribual violated the Rooker-Feldman Doctrine and Petitioners Constitutional Rights.. *The Brooks-McCollum v. Shareef, No. Civ. A. 147-N (Del. Ch.) filed Jan. 2, 2004 currently pending,* was filed prior to any US filings. Furthermore, the District outlines on App.26a. in its footnote, that it is aware that those actions are still pending, and still ruled against the Rooker-Feldman Doctrine and those constitutional rights of Respondent.

In the US Districts Courts 19a-23a, specifically, where the court states, *"Plaintiff now takes the position that the dollar amount cannot be determined until the issues are before a court and jury. In considering the Plaintiff's claims seeking compensation for failure to indemnify, attorney's fees, pain and suffering, and lost wages, the court finds Plaintiff meets jurisdictional requirement"*, whereby stating this it is clear the this court knows it is going against the issues decided and having been decided in the State courts in Civil Action *Brooks-McCollum v. Shareef, No. Civ. A. 147-N (Del. Ch.) filed Jan. 2, 2004* and currently pending; regarding indemnification pursuant the State Farm Policy.

This is a clear violation of the Rooker Feldman Doctrine and Respondents Constitutional Rights. This court's ruling would be accurate had these proceedings not first been filed in State Court [January 2004 and amended March 2004], however since that was not the case the courts order incorrectly applied the law, going against the basis of the Rooker-Feldman Doctrine.

In App.26a the District court makes it clear that it knows these cases are *'inextricably intertwined with [the] state adjudication.'"*, and lists all the cases this case is *'inextricably intertwined with [the] state adjudication.'"*, and is clearly why the courts chose not to report these cases [one should not intentionally deprive another of a constitutional right, merely because they dislike the proceedings at hand, the issues are for a jury to decide]. One should be afforded the protection of the constitution and the courts, when seeking an injustice. Clearly should this court review App.34a.-43a, it would note the US Courts incorrectly state in App.26a the reason for indemnification. These items are for indemnification for the state cause of actions, and reimbursement for the US cause of actions as required by the Corporations policies, because at each instance each court tried blocking Respondents from a right guaranteed by the constitution.

2. The Appellate Courts

The US Court of Appeals issued an order which is in direct conflict of the Order issued in this case. App.9a-14a (which states in part, *"The status of that litigation is unclear from the record but, while it remained pending, Brooks- McCollum filed a complaint in the District Court against Emerald Ridge, its Board and individual Board members, seeking essentially the same relief. The District Court dismissed complaint Brooks-McCollum, 166 Fed. Appx. 618, 619-20 (3d Cir. 2006), stating lack of subject matter jurisdiction, and the US Court Of Appeals For the Third Circuit affirmed, explaining why Brooks-McCollum's allegations did not state a colorable federal claim. See*

Brooks-McCollum, 166 Fed. Appx. 618, 619-20 (3d Cir. 2006)". The orders issued in *Brooks-McCollum, 166 Fed. Appx. 618, 619-20 (3d Cir. 2006)* supports that the US Court Of Appeals For the Third Circuit believes the causes of actions raised in these proceedings are the very same as those in *Brooks-McCollum, 166 Fed. Appx. 618, 619-20 (3d Cir. 2006)* , and the court remanded those issues back to state court, now to only take away Petitioner's rights to for those

The US Court Of Appeals goes further in App.9a-App.14a stating; that it only saw state violations. US District Court argues that the state courts denied Appellants request for Advancement (when in-deed the state court has not ruled on those issues App34a-35a, still pending in Chancery Civil Action *Brooks-McCollum v. Shareef, No. Civ. A. 147-N (Del. Ch.) filed Jan. 2, 2004 and currently pending)*, as well as in DE Superior Civil Action *McCollum v. Shareef, C.A. No. 05C-12-198 MMJ.* [As Noted By The US District Court App.26a.] However, the decision for this court to now make a ruling on issues in which it and the United States District Court of Delaware state throughout App.1a-56a, that all the issues are one of the same, strips Appellant of a Constitutional Right, while being in violation of the Rooker-Feldman Doctrine and continually violating Petitioners Ninth, and 14th Constitutional rights.

In US Court Of Appeals, Brooks-McCollum, and Emerald Ridge Service Corporation 05-1264 (App.35a-37a) this court remanded those issues back to the state court, while stripping Petitioner of her constitutional right guaranteed in that court, with conflicting orders in these proceedings.

In Brooks-McCollum v. Emerald Ridge Serv. Corp. Bd. Of Directors, Civ Action 04-703-JJF (D.Del. Jan. 11, 2005), aff'd, 166F App'x 618 (3d Cir. 2006) (not reported) the 3rd Circuit stated, "that it clearly saw *"quintessential state law causes of action: slander, violations of provisions of the*

Delaware criminal code, questions of corporate governance, and violations of the Delaware Code of Professional Conduct" (App.37a), and the US Appeals Courts knowing this, and remanding these items back to the cases which were stayed in the State courts, are clear violation of the Rooker-Feldman Doctrine. Furthermore, when the US Courts remanded *Brooks-McCollum v. Emerald Ridge Serv. Corp. Bd. Of Directors, Civ Action 04-703-JJF (D.Del. Jan. 11, 2005), aff'd, 166F App'x 618 (3d Cir. 2006)* (not reported) back to the state court, the case before this courts surrounding Respondents should have also been remanded. It is clear that the US Courts and the state courts argued these to all be the same cause of actions. It is further noted that State Courts and US Courts were and are aware that the very same issues are pending against Respondents in the State Courts (filed prior to these proceedings) App.26a.

3. The District Courts and Appellant Court Proceedings

Petitioner has pending cases in DE Chancery Court Brooks-*McCollum v. Shareef, No. Civ. A. 147-N (Del. Ch.)* filed Jan. 2, 2004 and currently pending, Delaware Superior Court in Civil Action *Brooks-McCollum v. Shareef, C.A. No. 05C-12-198 MMJ*, of which both US Courts remanded said items back to stating in their orders lack of jurisdiction of those issues, but now claim that they have jurisdiction over the very same issues having a direct impact on the issues pending in state court, as they indicate throughout App.1a-56a. Violation of Ninth, and 14th Constitutional rights and Seventh Constitutional rights

The other cases which were before the lower courts surrounding the very same issues are; *US Court of Appeals For Third Circuit, Civil Actions 05-2102-Brooks-McCollum vs. State Farm Insurance Company*; *US Court of Appeals For Third Circuit Civil Action 08-2716 - Brooks-McCollum vs. State Farm Insurance Company*;

The US courts continue to argue in App.29a-33a, the basis in which Respondents would become liable under the insurance policy. Respondents have continually argued that they were defending validly elected Directors in the state cause of actions and these, while also instructing those parties through their attorneys to break the laws to protect their interest. The US Courts remanded the actions against the Respondents whom Respondents were defending, where no court has ruled on those issues. Respondents would have been in a Catch 22 situation in the State proceedings had the court not violated the Rooker-Feldman Doctrine. Respondents would have to argue against their clients claiming them not to be validly elected Directors (of which Petitioner has outlined and proved through all proceedings) in order not to pay claims in which those parties are charged with, and/or accept that they knew their clients were breaking the law, and it is they who instructed them to continue the breaking of the law. The US Courts sites on App.26a the following cases related to these proceedings; *Brooks-McCollum v. Shareef, No. Civ. A. 147-N (Del. Ch.) filed Jan. 2, 2004 and currently pending; dismissed cases Brooks-McCollum v. Emerald Ridge Serv. Corp., No. 04C-03-074 (Del Super. Ct.), aff'd 875 A.2d 632 (Del. 2005), Brooks-McCollum v. State Farm Ins. Co., No. 04C-03-075 (Del. Brooks-McCollum v. State Farm Ins. Co., No. 04C-03-075 (Del. Super. Ct.), and Brooks-McCollum v. Shareef, Civ. Action No. 04-1419-JJf (D. Del. Aug. 15, 2005) aff'd, 213 F. App'x 92 (3d Cir 2007) (not reported); stayed case Brooks-McCollum v. Shareef, C.A. No. 05C-12-198 MMJ; and removed and remanded case Brooks-McCollum v. Emerald Ridge Serv. Corp. Bd. Of Directors, Civ Action 04-703-JJF (D.Del. Jan. 11, 2005), aff'd, 166F App'x 618 (3d Cir. 2006) (not reported).* One should not have to file numerous complaints in the hope of the courts adhering to the law.

The US Supreme Court has a *"continuing obligation to sua sponte raise the issue of subject matter jurisdiction when it is in question."* *Desi's Pizza, Inc. v. City of Wilkes-*

Barre, 321 F.3d 411, 420 (3d Cir. 2003) (citing Bracken v. Matgouranis, 296 F.3d 160, 162 (3d Cir. 2002)).

In determining whether federal subject matter jurisdiction over a case fails under the Rooker-Feldman doctrine because Respondent's claims are and have been litigated in state court.

The Rooker-Feldman doctrine, which was derived from two Supreme Court cases—*Rooker v. Fidelity Trust Co., 263 U.S. 413 (1923),* and *District of Columbia Court of Appeals v. Feldman, 460 U.S. 462 (1983)*—prevents lower federal courts from "sit[ting] in direct review of the decisions of a state tribunal." *Gulla v. North Strabane Twp., 146 F.3d 168, 171(3d Cir. 1998).* Because Congress has conferred jurisdiction to review a state court's decision only on the Supreme Court, see 28 U.S.C. § 1257, lower federal courts lack the power to decide claims in which "the relief requested . . . requires determining that the state court's decision is wrong or . . . void[ing] the state court's ruling." *Desi's Pizza, 321 F.3d at 419 (quoting FOCUS v. Allegheny County*

Court of Common Pleas, 75 F.3d 834, 840 (3d Cir. 1996)). As the court explained, "a claim is barred by Rooker-Feldman under two circumstances:

1. first, if the claim was 'actually litigated' in state court prior to the filing of the federal action or, (some of these claims filed prior to the proceedings in the US Courts were litigated in state courts as stated in App.26a by the US District Court in its' footnote and App.51a by the Delaware Chancery Court in its' beginning paragraph, while some are still being litigated in the state courts, and pending, where no final ruling has been made, although the State Courts stated, *"Petitioner was entitled to Indemnification, but not to advancement, which is now under direct review of the Delaware Chancery Court in Civil Action 147-N"*, after Chancery Court Parsons agreed he "erred" in his ruling, and the Delaware State Supreme Court stated, "in DE Supreme Civil Action 396, 2004, *"It*

appears that at all times relevant, McCollum herself was a member of the board." "Petitioner herself was a Director at all times relevant".. Having been a Director of the Corporation and having filed the issues raised in the these as well as the state proceedings guarantees Petitioner the right to be indemnified in all, and through the Corporations Policy of which is held by these Respondents. However the ruling in this court would violate and void the state courts ruling to be indemnified through the Corporations Policy as guaranteed. Furthermore, the state Chancery Court conferred that it erred in its ruling surrounding indemnification, where that is now under review of the Chancery Senior Judge, after said err was admitted.

2. Second, if the claim is 'inextricably intertwined with [the] state adjudication.'" *Desi's Pizza, 321 F.3d at 419 (quoting Parkview Assocs. P'ship v. City of Lebanon, 225 F.3d 321, 325 (3d Cir. 2000))*. (The court will note that the US courts themselves clearly state and have argued that the state issues are *'inextricably intertwined with [the] state adjudication.'"* Throughout all of their orders as outlined in 'inextricably intertwined with [the] state adjudication.'" See App.1a-56a.

The collateral order doctrine accepts a *"narrow range"* of interlocutory decisions from the general rule that only final orders are appealable. *In re Montgomery County, 215 F.3d 367, 373 (3d Cir. 2000) (citing Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 545–46 (1949))*. To be an appealable collateral order, it must *"conclusively determine the disputed issue, the issue must be completely separate from the merits of the action, and the decision must be effectively unreviewable on appeal from a final judgment." Id. (citing Coopers & Lybrand v. Livesay, 437 U.S. 463, 468 (1978))*. The state level decision need not be of its highest court. The Rooker-Feldman doctrine applies equally to final decisions of lower state courts. FOCUS, 75 F.3d at 840. Here there is no dispute that the claims are identical to the claims upon which the Delaware Chancery Court reached a judgment, and/or that the Delaware Chancery and

Delaware Superior Courts issues are inextricably intertwined with those which were before the lower courts, as they state in their Orders App.1a-56a.

Thus, in view of the Rooker-Feldman doctrine, Parkview Assocs. P'ship, 225 F.3d at 326, litigating Respondent's in state court presents the "paradigm situation in which Rooker-Feldman precludes a federal district court from proceeding." *E.B. v. Verniero, 119 F.3d 1077, 1090–91 (3d Cir. 1997)* (describing a case in which the federal court plaintiff sought an injunction directing that a state court order not be carried out).

This court has consistently (and recently) held that Rooker-Feldman does not bar claims of plaintiffs who were not parties to the state court proceeding. *See Nat'l R.R. Passenger Corp. v. Pa. Pub. Util. Comm'n, 342 F.3d 242, 257 (3d Cir.2003); Marks v. Stinson, 19 F.3d 873, 886 n.11 (3d Cir. 1994)*. But the court has also noted that this limiting principle of the Rooker-Feldman doctrine "has a close affinity to the principles embodied in the legal concepts of claim and issue preclusion." *Valenti v. Mitchell, 962 F.2d 288, 297 (3d Cir. 1992)*. Claims and issues decided against an entity bind also its parties in privity, including wholly owned subsidiaries. *Lubrizol Corp. v. Exxon Corp., 929 F.2d 960, 966 (3d Cir. 1991)*. Underscoring this common sense privity principle is the fact that Both parties interest in its federal claims is identical to the interest in their state court claims, because its right to recover is derivative of its subsidiaries' right to recover. As Respondents federal claims were "actually litigated" in state court, the court must analyze whether, under the alternative prong of the Rooker-Feldman doctrine, they were "inextricably intertwined with a previous state court adjudication." Parkview Assocs. P'ship, 225 F.3d at 327. (The US Court of Appeals agreed that the claims were inextricably intertwined) This case presents an equally clear application of the "inextricably intertwined" circumstance, which exists when "federal relief can only be predicated upon a conviction that the state court was

wrong," id. at 325, or when "the federal court must . . . take action that would render [the state court's] judgment ineffectual," FOCUS, 75 F.3d at 840.

Because the claims in this case were identical to the state claims, they are barred by the Rooker-Feldman doctrine. Even within the US Court's narrow confines for Rooker-Feldman, this case is easily cabined. We cannot imagine a more classic invocation of the Rooker-Feldman jurisdictional bar than to preclude a party from maintaining a federal action as an "insurance policy" in case the state trial court decision in that party's favor is overturned by an appellate state court.

REASONS FOR GRANTING THE PETITION

I. Review is warranted because The Opinion By The Panel of the Third Circuit Conflicts With An Opinion Of The Third Circuit as well as affirmations contained in opinions of this court.

II. Review Is Warranted Because the Decisions Conflicts with this court's Holding in the Rooker-Feldman doctrine, *Rooker v. Fidelity Trust Co., 263 U.S. 413 (1923),* and *District of Columbia Court of Appeals v. Feldman, 460 U.S. 462 (1983)*.

SUMMARY OF ARGUMENT

Petitioner respectfully ask this court to 1) Rule properly within the boundaries of the law in that the Rooker-Feldman Doctrine has been violated, and 2) hold that Respondents were and did act in state 3) reverse all Orders and decisions of the United States Court of Appeals and those of the United States District For Delaware and assess all costs associated with all these proceedings against Respondents 3) Remand these Respondents back to the State courts to be litigated with *Brooks-McCollum v. Shareef, No. Civ. A. 147-N (Del. Ch.) filed Jan. 2, 2004 and currently pending*; where in App.49a Chancery Court agrees that an amended complaint was filed on March 2004 adding these Respondents to those proceedings, (which was prior to any US proceedings).

Respectfully submitted,

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25 Rock Hollow Court
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(302) 521-1241

Case No.

IN THE

Supreme Court Of the United States

CATHY D. BROOKS-McCOLLUM,

Petitioner(s)

v.

State Farm Insurance Company

Respondent(s)

Appendix To Writ of Certiorari
To The United States Court Of Appeals For The Third Circuit

APPENDIX

Cathy D. Brooks-McCollum (Pro Se)

25 Rock Hollow Court
Elkton, MD 21921
(302) 521-1241

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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
No. 09-4362
CATHY D. BROOKS-McCOLLUM
& On behalf of Emerald Ridge Service
Corporation Derivative Action as a Director
v.
STATE FARM INSURANCE COMPANY
Cathy D. Brooks-McCollum,
Appellant
On Appeal from the United States District Court
for the District of Delaware
(D.C. Civil Action No. 1-04-cv-00419)
District Judge: Honorable Joseph J. Farnan, Jr.
Submitted Pursuant to Third Circuit LAR 34.1(a)
April 16, 2010
Before: SCIRICIA, Chief Judge, JORDAN and
GREENBERG, Circuit Judges.
JUDGMENT

This cause came to be considered on the record from the United States District Court for the District of Delaware and was submitted pursuant to Third Circuit LAR 34.1(a) on April 16, 2010. On consideration whereof, it is now hereby Case: 09-4362 Document: 003110109256 Page: 1 Date Filed: 04/20/2010

ORDERED and ADJUDGED by this Court that the judgment of the District Court entered November 10, 2009, be and the same is hereby affirmed. Costs taxed against appellant. All of the above in accordance with the opinion of this Court.

ATTEST:
/s/ Marcia M. Waldron Clerk
DATED: 20 April 2010

NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 09-4362

CATHY D. BROOKS McCOLLUM

& On behalf of Emerald Ridge Service Corporation Derivative Action as a Director

v.

STATE FARM INSURANCE COMPANY

Cathy D. Brooks-McCollum,

Appellant

On Appeal from the United States District Court for the District of Delaware

(D.C. Civil Action No. 1-04-cv-00419)

District Judge: Honorable Joseph J. Farnan, Jr.

Submitted Pursuant to Third Circuit LAR 34.1(a)

April 16, 2010

Before: SCIRICIA, Chief Judge, JORDAN and GREENBERG, Circuit Judges.

(Filed: April 20, 2010)

OPINION OF THE COURT

PER CURIAM.

Case: 09-4362 Document: 003110109253 Page: 1 Date Filed: 04/20/2010

State Farm Fire and Casualty Company was improperly named in the complaint as State Farm Insurance Company.[1]

2Appellant Cathy D. Brooks-McCollum appeals pro se from the District Court's order finding diversity jurisdiction pursuant to 28 U.S.C. § 1332(a) and granting summary judgment in favor of State Farm Insurance Company. We will affirm.

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[1] State Farm Fire and Casualty Company was improperly named in the complaint as State Farm Insurance Company.

In 2004, Brooks-McCollum filed a pro se complaint against appellee State Farm Insurance Company ("State Farm"). The complaint alleged that State Farm breached its obligation to indemnify her as a member of the board of directors of Emerald Ridge Service Corporation, a corporation which State Farm insured. She also asserted an individual tort claim against State Farm, and sought compensation for failure to indemnify, attorney's fees, pain and suffering, and lost wages. The District Court granted summary judgment in favor of State Farm, and Brooks-McCollum appealed. Because we were unable to determine from the record whether subject matter jurisdiction was present under 28 U.S.C. § 1332, we vacated the District Court's order granting summary judgment and remanded the matter for the District Court to determine whether it had jurisdiction. *See Brooks-McCollum v. State Farm Ins. Co., No. 08-2716 (order entered on April 8, 2009)*. On remand, the District Court ordered supplemental briefing on the parties' jurisdiction. State Farm submitted an affidavit from its assistant secretary-treasurer affirming that State Farm Fire and Casualty Company are incorporated in Illinois and its Case: 09-4362 Document: 003110109253 Page: 2 Date Filed: 04/20/2010
3 principal place of business is also Illinois, although it does do business in Delaware. Brooks-McCollum submitted an affidavit indicating that at the time she filed her complaint, she was a citizen of Delaware. Based on the supplemented record, the District Court found that there was diversity of citizenship between the parties, and reissued its order granting summary judgment in favor of State Farm. Brooks McCollum appealed. In her brief, she asserts only that the District Court erred in its determination of jurisdiction and now argues – contrary to the position she previously argued to the District Court – that no diversity of citizenship exists in this case.

II. We have jurisdiction over this appeal pursuant to 28 U.S.C. § 1291. We review a District Court's determination

of its jurisdiction de novo. See Emerald *Investors Trust v. Gaunt Parsippany Partners, 492 F.3d 192, 197 (3d Cir. 2007)*. To the extent that a District Court makes factual findings in determining jurisdiction, we review for clear error. *Pennzoil Prods. Co. v. Colelli & Assocs., Inc., 149 F.3d 197, 200 (3d Cir. 1998)*. We will not disturb the factual findings of the District Court unless we are "left with the definite and firm conviction that a mistake has been committed" in the District Court's fact-finding. *Frett-Smith v. Vanterpool, 511 F.3d 396, 399 (3d Cir. 2008) (citation omitted)*. III. Case: 09-4362 Document: 003110109253 Page: 3 Date Filed: 04/20/2010 2 As we noted in our prior opinion, Brooks-McCollum makes no colorable allegation that State Farm is a state actor, or that State Farm violated any federal law. Her "citation of various constitutional and federal statutory provisions does not transform [her] state law claims into causes of action 'arising under' the Constitution or federal law." *Brooks-McCollum v. State Farm Ins. Co., 321 F. App'x 205, 207 n.2 (3d Cir. 2009) (not precedential)*.

Brooks-McCollum filed her lawsuit without asserting a basis for federal jurisdiction.[2] In as much as the complaint alleged that private actors violated state laws, the only possible basis for subject matter jurisdiction in federal court would be diversity jurisdiction. Diversity jurisdiction requires that the controversy be between citizens of different states, and that the amount in controversy exceed $75,000. 28 U.S.C. §1332(a)(1). Whether diversity jurisdiction exists is determined by examining "the facts as they exist when the complaint is filed." *Newman-Green, Inc.*

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[2] As we noted in our prior opinion, Brooks-McCollum makes no colorable allegation that State Farm is a state actor, or that State Farm violated any federal law. Her "citation of various constitutional and federal statutory provisions does not transform [her] state law claims into causes of action 'arising under' the Constitution or federal law." *Brooks- McCollum v. State Farm Ins. Co., 321 F. App'x 205, 207 n.2 (3d Cir. 2009) (not precedential).*

v. Alfonzo-Larrain, 490 U.S. 826, 830 (1989); Grand Union Supermarkets of the V.I., Inc. v. H.E. Lockhart Mgmt., Inc., 316 F.3d 408, 410 (3d Cir. 2003). For diversity purposes, a corporation is a citizen of "any State by which it has been incorporated and of the State where it has its principal place of business." Grand Union Supermarkets, 316 F.3d at 410 (quoting 28 U.S.C. § 1332(c)). Although a company may conduct business in multiple places, the "principal place of business" is its "nerve center": "the place where a corporation's officers direct, control, and coordinate the corporation's activities." *See Hertz Corp. v. Friend, No. 08-1107, 2010 WL 605601, at *11, (U.S. Feb. 23, 2010)* (establishing "nerve center" test as uniform approach for determining corporate citizenship). Brooks-McCollum alleges that there is no diversity of citizenship between Case: 09-4362 Document: 003110109253 Page: 4 Date Filed: 04/20/2010

At least one document submitted to the District Court by Brooks-McCollum appears to confirm this. The Appendix to Brooks-McCollum's brief in support of her motion for summary judgment contains as an excerpt from State Farm's insurance policy indicating

that State Farm Fire and Casualty Company is a "stock company with home offices in Bloomington, Illinois." (1:04-cv-00419 Doc. No. 19 p.17.) 4 Brooks-McCollum submits with her reply brief a document from the Delaware Department of State website indicating that State Farm of Newark Delaware, Inc., has its corporate residence in Delaware. However, there is no evidence as to how State Farm of Newark Delaware, Inc., may be affiliated with the Appellee, nor is there any evidence that State Farm of Newark Delaware, Inc., issued the insurance policy at issue in this

litigation. The parties because at the time the complaint was filed, she was a citizen of Delaware and State Farm was incorporated in Delaware. Even if not incorporated in Delaware, Brooks-McCollum argues that Delaware law

only requires that a corporation do business there to be subjected to proceedings in the State.

State Farm averred by sworn affidavit that it is incorporated in Illinois, and has its principal place of business in Illinois.[3] Although State Farm concedes that it does business in Delaware, there is no indication that Delaware is where State Farm conducts its corporate affairs. Brooks-McCollum has submitted no evidence to the contrary.[4] The District Court is permitted to rely on State Farm's affidavit, and we find no clear error in the District Court's fact-finding. *See Murray v. Commercial Union Ins. Co., 782 F.2d 432, 434 (3d Cir. 1986)* (establishing corporate citizenship via affidavit). Because Brooks-McCollum was a citizen of Delaware at the time the complaint was filed, and State Farm was a citizen of Illinois, the District Court correctly concluded that the parties

are diverse as to citizenship. Case: 09-4362 Document: 003110109253 Page: 5 Date Filed: 04/20/2010 6

In determining whether the amount in controversy reaches the threshold of $75,000.00, the court generally accepts the plaintiff's good faith allegations. *Columbia Gas Transmission Corp. v. Tarbuck, 62 F.3d 538, 541 (3d Cir. 1995)*. A case may be dismissed for failure to meet the

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[3] At least one document submitted to the District Court by Brooks-McCollum appears to confirm this. The Appendix to Brooks-McCollum's brief in support of her motion for summary judgment contains as an excerpt from State Farm's insurance policy indicating that State Farm Fire and Casualty Company is a "stock company with home offices in Bloomington, Illinois." (1:04-cv-00419 Doc. No. 19 p.17.)

[4] Brooks-McCollum submits with her reply brief a document from the Delaware

Department of State website indicating that State Farm of Newark Delaware, Inc., has its corporate residence in Delaware. However, there is no evidence as to how State Farm of Newark Delaware, Inc., may be affiliated with the Appellee, nor is there any evidence that State Farm of Newark Delaware, Inc., issued the insurance policy at issue in this litigation.

amount in controversy requirement only if it appears to a "legal certainty" that the claim is for less than the jurisdictional amount. *St. Paul Mercury Indem. Co. v. Red Cab Co., 303 U.S. 283, 289 (1938); Dardovitch v. Haltzman, 190 F.3d 125, 135 (3d Cir. 1999)*. Brooks-McCollum contends that State Farm's offer of settlement for $15,000 is an admission on behalf of State Farm that the amount in controversy is less than the required $75,000. In evaluating the amount in controversy requirement, a court must examine "the facts as they exist when the complaint is filed." Newman-Green, 490 U.S. at 830. A settlement offer is a subsequent event between the parties that has no relevance to the amount in controversy at the time the complaint was filed. Additionally, "the inability of a plaintiff to recover an amount adequate to give the court jurisdiction does not . . . oust the jurisdiction." St. Paul Mercury, 303 U.S. at 289. The District Court considered Brooks-McCollum's claims seeking compensation for

failure to indemnify, attorney's fees, pain and suffering, and lost wages, and correctly determined that these forms of relief were recoverable under Delaware state law. See *Horton v. Liberty Mut. Ins. Co., 367 U.S. 348, 352-53 (1961)* (holding that in diversity cases, the court looks to state law to determine the nature and extent of the right to be enforced); see also *Dell Donne & Assocs., LLP v. Millar Elevator Serv. Co., 840 A.2d*

1244, 1255 (Del. 2004) (holding that attorneys' fees incurred as a result of defending Case: 09-4362 Document: 003110109253 Page: 6 Date Filed: 04/20/2010 5 Brooks-McCollum claims that State Farm has raised new issues regarding jurisdiction, and therefore she requests leave to file additional documents which she believes are relevant to the Court's review of this issue. Because we find that the District Court relied on sufficient evidence in determining jurisdiction and find no clear error in the District Court's fact-finding, we deny Brooks-McCollum's motion.7

claims that are the subject of the duty to indemnify are recoverable); *Mills v. Telenczak, 345 A.2d 424, 426 (Del. 1975)* (holding that pain and suffering damages are permitted in personal injury claims). Thus, the District Court did not err in concluding that it could not be said to a "legal certainty" that the amount in controversy did not meet the jurisdictional amount. We find no clear error in the District Court's determination in this case that the requirements for subject matter jurisdiction had been met. State Farm contends that because Brooks-McCollum did not argue in her brief that the District Court erred in granting summary judgment, she has waived the right to appeal that decision. We agree. *See United States v. Pelullo, 399 F.3d 197, 222 (3d Cir. 2005)*. Nevertheless, because Brooks-McCollum is proceeding pro se, we have reviewed the District Court's decision granting summary judgment. We are satisfied that summary judgment was appropriate for the reasons given by the District Court. Accordingly, the order of the District Court finding that it had jurisdiction pursuant to 28 U.S.C. § 1332(a), and granting summary judgment in favor of State Farm will be affirmed. Brooks-McCollum's motion for leave to file a supplemental appendix is denied.[5] Case: 09-4362 Document: 003110109253 Page: 7 Date Filed: 04/20/2010

[5] Brooks-McCollum claims that State Farm has raised new issues regarding jurisdiction, and therefore she requests leave to file additional documents which she believes are relevant to the Court's review of this issue. Because we find that the District Court relied on sufficient evidence in determining jurisdiction and find no clear error in the District Court's fact-finding, we deny Brooks-McCollum's motion.

*As to panel rehearing only.

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 09-4362

CATHY D. BROOKS-McCOLLUM

& On behalf of Emerald Ridge Service Corporation Derivative Action as a Director

v.

STATE FARM INSURANCE COMPANY

Cathy D. Brooks-McCollum,

Appellant

(D.C. Civ. No. 04-cv-00419)

SUR PETITION FOR REHEARING

Present: SCIRICA, Chief Judge,

SLOVITER, McKEE, RENDELL, BARRY, AMBRO, FUENTES, SMITH,

FISHER, CHAGARES, JORDAN, HARDIMAN, GREENAWAY

and GREENBERG*, Circuit Judges.

The petition for rehearing filed by appellant in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court en banc, is denied.

BY THE COURT,

/s/ Anthony J. Scirica

Chief Judge

Dated: May 3, 2010

tmk/cc: Cathy D. Brooks-McCollum

Stephen P. Casarino, Esq.

NOT PRECEDENTIAL
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 08-2716

CATHY D. BROOKS-MCCOLLUM,
Appellant
v.
STATE FARM INSURANCE COMPANY

Appeal From the United States District Court
For the District of Delaware
(D.C. Civil No. 04-cv-00419)
District Judge: Honorable Joseph J. Farnan, Jr.

Submitted Pursuant to Third Circuit LAR 34.1(a)
April 3, 2009
Before:RENDELL, FUENTES and NYGAARD, Circuit Judges
(Filed April 08, 2009)

OPINION OF THE COURT

PER CURIAM
Cathy D. Brooks-McCollum appeals pro se from the District Court's order
granting State Farm Insurance Company's motion for summary judgment and denying her own. For the following reasons, we will vacate and remand for further proceedings. Case: 08-2716 Document: 00318846320 Page: 1 Date Filed: 04/08/2009 2 I. Brooks-McCollum was, and claims still to be, a Director of the Board of Emerald Ridge Services Corporation, a company that provides maintenance services

for a Delaware real estate development called Emerald Ridge. This lawsuit is the latest of at least six state and federal suits that she has filed following a dispute with other members of the Board, which apparently began when the Board refused to reimburse her $185.00 that she had paid out of her own pocket for power washing expenses. Following that incident, Brooks-McCollum resigned from the Board but later purported to "rescind" her resignation. She also filed a lawsuit in Delaware state court, contending that she was the sole properly-elected member of the Board and seeking, inter alia, a determination of the proper membership of the Board, reimbursement of the $185.00 she had paid, and "indemnification" from the Board for her legal expenses. **The status of that litigation is unclear from the record but, while it remained pending, Brooks- McCollum filed a complaint in the District Court against Emerald Ridge, its Board and individual Board members, seeking essentially the same relief. The District Court dismissed that complaint for lack of subject matter jurisdiction, and we affirmed, explaining why Brooks-McCollum's allegations did not state a colorable federal claim. See Brooks-McCollum, 166 Fed. Appx. 618, 619-20 (3d Cir. 2006).** In the meantime, Brooks-McCollum had filed the complaint at issue here. This complaint names as the sole defendant State Farm, which issued a business liability Case: 08-2716 Document: 00318846320 Page: 2 Date Filed: 04/08/2009 Brooks-McCollum purported to bring her suit, and 1 purports to appeal, both individually and on behalf of Emerald Ridge. Brooks-McCollum, however, may not represent Emerald Ridge pro se. *See Simbraw, Inc. v. United States, 367 F.2d 373, 374 (3d Cir. 1966)*. 3 insurance policy to Emerald Ridge and tendered thereunder a defense to Emerald Ridge and the individual Board members in the state court litigation. Brooks-McCollum alleges that State

Farm is (1) obligated under the policy to pay her legal fees as well and (2) liable

as a "joint tortfeasor" for "encouraging and aiding and funding" various allegedly-illegal actions by the Board members, including the vandalism of her vehicle. By order entered May 13, 2008, the District Court granted State Farm's motion for summary judgment after concluding that State Farm was entitled to judgment as a matter of Delaware state law on both claims. In particular, the District Court determined that the State Farm policy provides indemnification only for liability imposed on Emerald Ridge and its Board, and provides no benefits to an insured against whom no action has been brought. The District Court also concluded that Brooks-McCollum presented no evidence of State Farm's involvement in the vandalism of her vehicle or any other illegal action. Brooks-McCollum appeals, and we have jurisdiction under 28 U.S.C. § 1291.[1] II.

Ordinarily, we would exercise plenary review over the District Court's ruling on the parties' motions for summary judgment. *See Prudential Ins. Co. of Am. v. Hovis, 553 F.3d 258, 262 (3d Cir. 2009)*. This case, however, raises a threshold issue regarding the Case: 08-2716 Document: 00318846320 Page: 3 Date Filed: 04/08/2009 Despite her citation of various federal criminal 2 and other statutes, Brooks-McCollum makes no colorable allegation that State Farm has violated any federal law. Nor does she make any colorable allegation that State Farm is a state actor. Instead, as we explained in her previous appeal, she asserts only "quintessential state law causes of action," and "[h]er citation of various constitutional and federal statutory provisions does not transform these state law claims into causes of action 'arising under' the Constitution or federal

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[1] Brooks-McCollum purported to bring her suit, and 1 purports to appeal, both individually and on behalf of Emerald Ridge. Brooks-McCollum, however, may not represent Emerald Ridge pro se. *See Simbraw, Inc. v. United States, 367 F.2d 373, 374 (3d Cir. 1966).*

law." Brooks-McCollum, 166 Fed. Appx. at 619. 4 District Court's jurisdiction, which we are obligated to address sua sponte. *See Employers Ins. of Wausau v. Crown Cork & Seal Co., 905 F.2d 42, 45 (3d Cir. 1990)*. ("'[E]very federal appellate court has a special obligation to satisfy itself not only of it's own jurisdiction, but also that of the lower courts in a cause under review.'") (citation omitted). The District Court did not explain the basis for its exercise of jurisdiction, and the record does not allow us to determine whether jurisdiction was present. Accordingly, we must vacate and remand. See id. at 47. In her complaint, Brooks-McCollum alleged that the District Court had federal question jurisdiction under a variety of federal statutes. The District Court, however, did not discern any federal claim in Brooks-McCollum's complaint, and neither do we.[2] Instead, it properly discerned **and addressed only the two state-law claims against State Farm identified above**. Because Brooks-McCollum properly asserted only those state-law claims, the only potential basis for jurisdiction in the District Court was diversity of citizenship under 28 U.S.C. § 1332(a). Brooks-McCollum alleged diversity jurisdiction in her complaint, but she alleged neither State Farm's citizenship nor her own. In its answer, State Farm denied that the District Court had jurisdiction and pleaded lack of

Case: 08-2716 Document: 00318846320 Page: 4 Date Filed: 04/08/2009

State Farm also argues that Brooks-McCollum 3 has not alleged that the amount in controversy exceeds $75,000,

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[2] Despite her citation of various federal criminal 2 and other statutes, Brooks-McCollum makes no colorable allegation that State Farm has violated any federal law. Nor does she make any colorable allegation that State Farm is a state actor. Instead, as we explained in her previous appeal, she asserts only "quintessential state law causes of action," and "[h]er citation of various constitutional and federal statutory provisions does not transform these state law claims into causes of action 'arising under' the Constitution or federal law." Brooks-McCollum, 166 Fed. Appx. at 619.

but it cannot be said to a "legal certainty" from her complaint that she seeks less than that amount. *Dardovitch v. Haltzman, 190 F.3d 125, 135 (3d Cir. 1999)*.
jurisdiction as an affirmative defense, though it too neglected to plead either party's citizenship. The District Court did not determine the parties' citizenship or otherwise address whether it had diversity jurisdiction. Nor did the parties raise any issue of jurisdiction on appeal (State Farm asserted merely that "[i]t is believed that Plaintiff contends" that the District Court had federal question jurisdiction). Nevertheless, in light of our obligation to inquire into the District Court's jurisdiction sua sponte, we directed the parties to file supplemental briefs on this issue, which they have now done. Brooks-McCollum argues that the District Court had diversity jurisdiction because State Farm "resides" in and issued the insurance policy out of Maryland and has its home office in Illinois. She does not allege her own citizenship, which is unclear (certain of her filings bear both a Maryland address and different Delaware addresses), but her citizenship "at the time the complaint was filed" controls. *Midlantic Nat. Bank v. Hansen, 48 F.3d 693, 696 (3d Cir. 1995)*. State Farm argues that the District Court did not have diversity jurisdiction. It makes no representation regarding its citizenship, but it argues that there is no diversity because its citizenship is deemed the same as Brooks-McCollum's for purposes of this type of suit under 28 U.S.C. § 1332(c)(1).[3] Case: 08-2716 Document: 00318846320 Page: 5 Date Filed: 04/08/2009 6 That provision, however, does not apply to this type of suit. The provision reads in relevant part: "in any direct action against the insurer of a policy or contract of liability insurance . . . to which action the insured is not joined as a party-defendant, such insurer

[3] State Farm also argues that Brooks-McCollum 3 has not alleged that the amount in controversy exceeds $75,000, but it cannot be said to a "legal certainty" from her complaint that she seeks less than that amount. *Dardovitch v. Haltzman, 190 F.3d 125, 135 (3d Cir. 1999).*

shall be deemed a citizen of the State of which the insured is a citizen, as well as" the insurer's place of incorporation and principal place of business. 28 U.S.C. § 1332(c)(1). State Farm argues that this provision applies because Brooks-McCollum brought her action directly against it without naming the "insured" (i.e., Emerald Ridge and its covered directors) as defendants. Leaving aside the issue of whether Brooks-McCollum herself or the allegedly "illegitimate" membership of Emerald Ridge are properly considered the "insured" under this policy, which the District Court did not decide, this action is not the kind of "direct action" contemplated by the statute. "[A] 'direct action,' as that term is used in § 1332(c), does not exist 'unless the cause of action against the insurance company is of such a nature that the liability sought to be imposed could be imposed against the insured,'" and it does not include suits by an insured against his or her own insurer. *McGlinchey v. Hartford Accident & Indem. Co., 866 F.2d 651, 653 (3d Cir. 1989) (citation omitted). See also Rosa v. Allstate Ins. Co., 981 F.2d 669, 674-75 (2d Cir. 1992)* (explaining rationale underlying this provision). In this case, Brooks-McCollum seeks damages for State Farm's own alleged liability to her, not for any liability that could be imposed against Emerald Ridge or its directors. Thus, this provision does not apply, and State Farm's citizenship for diversity purposes turns

Case: 08-2716 Document: 00318846320 Page: 6 Date Filed: 04/08/2009

instead on its state of incorporation and principal place of business. See 28 U.S.C. §1332(c)(1). The pleadings contain no allegation in that regard, and there is nothing in the record before us that would allow us to determine State Farm's citizenship even if we were inclined to address that issue in the first instance. *See Mennen Co. v. Atlantic Mut. Ins. Co., 147 F.3d 287, 293-94 (3d Cir. 1998)* ("subject matter jurisdiction depends upon facts of record"); Employers Ins. of Wausau, 905 F.2d at 47 & n.5

remanding where record insufficient to determine, inter alia, citizenship of parties for diversity purposes). Accordingly, because we cannot determine from the record whether the District Court had subject matter jurisdiction over this dispute, we are constrained to vacate its order entering summary judgment in favor of State Farm and remand for the District Court to determine whether it has diversity jurisdiction and to conduct such proceedings as may be necessary in that regard. In light of this disposition, we do not reach the merits of the District Court's ruling. We note, however, that we have no reason to believe that plenary review of that ruling would lead us to a different conclusion. Brooks McCollum's "motion to review lower court[']s order on legal fees and court costs" and motion to strike State Farm's supplemental appendix are denied. Case: 08-2716 Document: 00318846320 Page: 7 Date Filed: 04/08/2009

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 08-2716

CATHY D. BROOKS-MCCOLLUM,

Appellant

v.

STATE FARM INSURANCE COMPANY

Appeal From the United States District Court
For the District of Delaware
(D.C. Civ. No. 04-cv-00419)
District Judge: Honorable Joseph J. Farnan, Jr.

Submitted Pursuant to Third Circuit LAR 34.1(a)
April 3, 2009
Before: RENDELL, FUENTES and NYGAARD, Circuit Judges

JUDGMENT

This cause came to be heard on the record from the United States District Court for the District of Delaware and was submitted pursuant to Third Circuit LAR 34.1(a) on April 3, 2009. On consideration whereof, it is now here ORDERED and ADJUDGED by this Court that the order of the District Court entered May 15, 2008, be and the same is hereby vacated and this matter remanded for further proceedings. The parties shall bear their own costs. All of the above in accordance with the opinion of this Court.

ATTEST:

/s/Marcia M. Waldron

Clerk

DATED: April 8, 2009

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE
CATHY D. BROOKS-MCCOLLUM,
Plaintiff,
v. Civil Action No. 04-419-JJF
STATE FARM INSURANCE COMPANY,
Defendant.
ORDER
NOW THEREFORE, IT IS HEREBY ORDERED that:
1. Defendant's Motion For Summary Judgment is GRANTED.
(D.I. 85.)
2. Plaintiff's Motion for Summary Judgment is DENIED.
(D.I. 112.)
3. Plaintiff's Motion To Compel is DENIED as moot. (D. I. 107.)
4. Defendant's Motion To Quash Subpoena is DENIED as moot.
(D.I. 110.)
5. Plaintiff's Motion To Strike Reply Brief is DENIED as moot. (D.I. 116.)

November 10, 2009 UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE
CATHY D. BROOKS-MCCOLLUM,
Plaintiff,
v. Civil Action No. 04-419-JJF
STATE FARM INSURANCE COMPANY,
Defendant.
ORDER
NOW THEREFORE, IT IS HEREBY ORDERED that:
1. The Court has jurisdiction pursuant to 28 U.S.C. §1332(a).
2. The May 13, 2008 Memorandum Opinion and Order will be issued.

November 10, 2009 UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE
CATHY D. BROOKS-MCCOLLUM,
Plaintiff,
v. Civil Action No. 04-419-JJF
STATE FARM INSURANCE COMPANY,
Defendant.
JUDGEMENT IN A CIVIL CASE

For the reasons stated in the Court's Memorandum Opinion an Order issued on November 10, 2009;

IT IS ORDERDED AND ADJUDGED that judgment be and is hereby entered in favor of Defendant and against Plaintiff.

UNITED STATES DISTRICT JUDGE

Dated: November 10, 2009

(By) Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

CATHY D. BROOKS-MCCOLLUM,
Plaintiff,

v. Civil Action No. 04-419-JJF

STATE FARM INSURANCE COMPANY,
Defendant.

Cathy D. Brooks-McCollum, Wilmington, DE, Pro Se Plaintiff

Stephen P. Casarino, Esquire, Casarino, Christman & Shalk, P.A., Wilmington, DE . Attorney For Defendant State Farm Insurance Company.

MEMORANDUM OPINION

November 10, 2009
Wilmington, Delaware

Plaintiff Cathy D. Brooks-McCollum ("Plaintiff"), who proceeds pro se, filed a Complaint on June 22, 2004. (D.I. 1.) In her Complaint, Plaintiff, individually, and on behalf of the Emerald Ridge Service Corporation ("Emerald Ridge") asserted a claim against Defendant State Farm Insurance Company ("Defendant") for breach of contract for failing to indemnify her as a member of Emerald Ridge's Board of Directors ("the Board").[4] She also asserted an individual tort claim against Defendant. Plaintiff appealed this Court's order granting Defendant's Motion For Summary Judgment. The Third Circuit vacated the Court's Order and remanded the matter to determine whether this Court has diversity jurisdiction pursuant to 28 U.S.C. §1332(a). For the reasons discussed below, the Court concludes that it has diversity jurisdiction over this action pursuant to 28 U.S.C. §1331, and therefore, the Court will reissue its May 13, 208 Memorandum Opinion Order. (See D.I. 120, 121.)

1. FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff's Complete alleges this Court has jurisdiction under a number of federal statutes and diversity jurisdiction pursuant to 28 U.S.C. §1332. (D.I. 1 and 2.) The Complaint however, makes no colorable allegation that Defendant has violated any federal law. *Brooks-McCollum v. State Farm Ins. Co., 321 F. App'x 205, 207 n.2 (3d Cir. 2009) (not published)*. Nor does it allege Plaintiff's citizenship or Defendant's citizenship, or specify an amount in controversy. Plaintiff signed the Complaint with a Delaware address and the proof of service also contains her Delaware address. The Proof of Service was mailed to Defendant at a Maryland address and a Delaware address.

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[4] Plaintiff may not represent Emerald Ridge pro se. *See Brooks-McCollum v. State Farm Ins. Co., 321 F. App'x 205, 207 n.1 (3d Cir. 2009) (not published) (siting Simbraw, Inc. v. United States, 367 F.2d 373, 374 (3d Cir. 1966)*.

On May 13, 2008 the Court granted Defendant's Motion for Summary Judgment and entered judgment on behalf of Defendant and against Plaintiff. (D.I. 120, 121, 122.) Plaintiff appealed The Third Circuit found that the record did not allow it to determine whether jurisdiction was present pursuant to 28 U.S.C. §1332(c) (1). Defendant also argued that the Complaint did not allege that the amount in controversy exceeded $75,000. The Third Circuit found §1332 (c) (1) inapplicable but, because it could not determine Defendant's citizenship from the record, vacated this Court's Opinion and Order entering summary judgment and remanded the matter for this Court to determine if diversity exists between the parties thus providing this Court with jurisdiction.[5] On remand, this Court ordered the parties to supplement the record on the diversity jurisdiction issue. (D.I. 139, 142.)

The parties' respective submissions establish that Plaintiff was a resident of Delaware at the time she filed the Complaint and that Defendant is a corporation, incorporated in the State of Illinois with its principal place of business in Bloomington, Illinois. (D.I. 140, 141, 143, 144.) The Complaint seeks indemnification, payment of Plaintiff's legal fees, damages for pain and suffering, lost wages, and other miscellaneous expenses. (D.I. 1 and 8, 21.)

II. JURISDICTION

Interestingly. Both parties have changed their positions on whether this Court has jurisdiction pursuant to 28 U.S.C. § 1332(a) by reasons of diversity. On appeal, Plaintiff argued that the parties were diverse in citizenship, and Defendant argued they were not. Plaintiff

[5] The Third Circuit did not reach the merits of the case, but noted, "we have no reason to believe that plenary review of the District Court's ruling) would lead us to a different conclusion." Brooks-McCollum, 321 F. App'x at 208

now argues that the parties are not diverse,[6] while Defendant concedes the parties are diverse. With regard to the amount in controversy. Plaintiff states that the dollar amount cannot be determined until the proceedings have been placed before a court and jury. (D.I. 144.) Defendant did not address the issue. Instead, Defendant states that it has abandoned the affirmative defense of lack of jurisdiction for diversity. (D.I. 143.)

"Whether diversity jurisdiction exists is determined by examining the citizenship of the parties at the time the complaint was filed." *Midlantic Nat'l Bank v. Hansen, 48 F.3d 693, 696 (3d Cir. 1995)*. Additional, as a general rule, the amount in controversy is determined as of the time the complaint is filed, and once a federal court finds that it has diversity jurisdiction, subsequent events cannot divest the court of jurisdiction. *Carlisle v. Matson Lumber Co., 186 F. App'x 219, 225 (3d Cir. 2006 (not published) (citing Newman-Green, Inc. v. Alfonzo-Larain, 490 U.S. 826, 830 (1989))*. Pursuant to §1332(a), district courts have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs and is between citizens of different states. 28 U.S.C. §1332(a). A corporation is deemed to be a citizen of any state which it has been incorporated and of

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[6] Plaintiff's affidavit states that all issues in this case should be jointly argued in the Delaware State Courts. It further states that jurisdiction does not lie with this Court. It appears that Plaintiff's new position on diversity jurisdiction is a result of this Court's ruling, vacated by the Third Circuit, finding against her, as well as her displeasure with Defendant's change in position (i.e., "Continually allowing these defendants to change positions will hurt the Corporation, other parties awaiting indemnification pursuant [to] the State Farm Policy in the State Court and that of Plaintiff." (D.I. 141 at 1.) Based upon the content of her affidavit, it may be that Plaintiff wishes to voluntarily dismiss her case or that she believes the case should be remanded. Plaintiff, however, did not request dismissal. And, because the case was originally filed in this Court and not State Court, a remand is procedurally improper. If this Court does not have diver Red Cab Co., 303 U.S. 283, 290-292 (1938).

the state where it has its principal place of business. 28 U.S.C. §1332(c); see also *Carolina Casualty Ins. Co., v. Insurance Co. of N. Am., 595 F.2d 128, 130 n.1 (3d Cir. 1979)*.

The amount in controversy must exceed $75,000 exclusive of interests and costs. Unless the law gives a different rule. The sum claimed by Plaintiff controls if the claim is apparently made in good faith. *St. Paul Mercury Indem. Co. v. Red Cab Co, 303 U.S. 283, 288-89 (1983)*. If the underlying jurisdiction facts are not in dispute, a federal court must decide whether it appears to a "legal certainty" that the plaintiff cannot recover the jurisdiction amount requirement. *Frederico v. Home Depot, 507 F.3d 188, 194, 197 (3d Cir. 2007) (citing St. Paul Mercury Indem. Co. v. Red Cab Co., 303 U.S. 283 (1938)*. When such a finding is made, the case must be dismissed. *Columbia Gas Transmission Corp. v. Tarbuck, 62 F.3d 438, 541 (3d Cir. 1995)* (dismissal is appropriate only if the federal court is certain that the jurisdiction amount cannot be met). In diversity cases, the Court looks to state law to determine the nature and extent of the right to be enforced. *See Horton v. Liberty Mut. Ins. Co., 367 U.S. 348, 352-53 (1961)*.

The underlying jurisdictional facts are not in dispute. The record reflects that, at the time the Complaint was filed, the parties were diverse as to their citizenship. With regard to the amount in controversy, Plaintiff now takes the position that the dollar amount cannot be determined until the issues are before a court an jury. In considering the Plaintiff's claims seeking compensation for failure to indemnify, attorney's fees, pain and suffering, and lost wages, the Court finds Plaintiff meets the jurisdiction requirement amount. *See Delle Donne & Associates LLP v. Millar Elevator Serv. Co., 840 A.2d 1244,1255 (Del. 2004)* (Attorneys' fees and expenses may be recovered under an indemnification agreement if they are incurred as a result of defending the claims that are the subject of the duty to

indemnify); *State Farm Mut. Auto. Ins. Co. v. Abramowicz, 386 A.2d 670, 671 (Del. 1978)* ("[T]he ruling in this case...established a legal right of plaintiff to recover damages pursuant to the insurance policy.) Indeed as stated by the Third Circuit, "it cannot be said to a 'legal certainty' from (Plaintiff's) complaint that she seeks less than [$75,000]." *Brooks-McCollum, 321 F. App'x at 206 n.3 (citing Dardovitch v. Haltzman, 190 F.3d 125, 135 (3d cir. 1998)*.

For the above reasons, the Court finds that the parties are diverse with respect to their citizenship, and accordingly, the Court concludes that it has jurisdiction pursuant to 28 U.S.C. §1332(a).

III.CONCLUSION

For the reasons discussed, the Court concludes that it has jurisdiction pursuant to 28 U.S.C. §1332(a). The Court will reissue the previously vacated May 13, 2008 Memorandum Opinion and Order and include in that Memorandum Opinion a statement concerning the Court's conclusion regarding jurisdiction as set forth in this Memorandum Opinion. (See D.I. 120, 121.)

An appropriate Order will be entered.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

CATHY D. BROOKS-MCCOLLUM,
Plaintiff,

v. Civil Action No. 04-419-JJF

STATE FARM INSURANCE COMPANY,
Defendant.

Cathy D. Brooks-McCollum, Wilmington, DE, Pro Se Plaintiff

Stephen P. Casarino, Esquire, Casarino, Christman & Shalk, P.A., Wilmington, DE . Attorney For Defendant State Farm Insurance Company.

MEMORANDUM OPINION

November 10, 2009
Wilmington, Delaware

Plaintiff Cathy D. Brooks-McCollum ("Plaintiff") filed her Complaint on June 22, 2004. (D.I. 1.) Plaintiff, individually, and on behalf of the Emerald Ridge Service Corporation ("Emerald Ridge") asserts a claim against State Farm Insurance Company ("Defendant") for breach of contract for failing to indemnify her as a member of Emerald Ridge's Board of Directors ("the Board"). She also advances an individual tort claim against Defendant.[1] Plaintiff proceeds pro se. As concluded in a recent Memorandum Opinion and Order, the Court has jurisdiction pursuant to 28 U.S.C. §1332(a).

Presently before the Court are Plaintiff and Defendant's Motions For Summary Judgment, responses and replies, as well as Plaintiff's Motion To Compel and To Strike; and Defendant's Motion To Quash Subpoena. (D.I. 85, 86, 89, 99,104, 105, 107, 108, 110, 111, 112, 113, 114, 115, 116, 117.) For the reasons discussed, the Court will grant Defendant's Motion For Summary Judgment, will deny Plaintiff's Motion For Summary Judgment, and will deny as moot all other pending Motions. The Court reinstates the previously vacated May 13, 2008 Memorandum Opinion and Order, as follows:

I. FACTUAL AND PROCEDURAL BACKGROUND

Litigation ensued following an incident that occurred when Plaintiff was a Director on the Board of Emerald Ridge is to maintain the real estate development known as Emerald Ridge[2] its Board manages and controls the

[1] Plaintiff's pleadings contain an array of claims and refer to numerous individuals, many of whom she refers to as "defendants." Much of her argument is surplusage and irrelevant. The Court will limit its decision to the issues listed above: indemnification pursuant to a contract of insurance and the alleged tortuous actions of defendant.

[2] The nature of the business of Emerald Ridge is to provide for snow removal, maintenance, repair, replacement and regulation of roads, streets and entrance ways, if not provided by the State of Delaware, to maintain and repair as required all storm water management areas and facilities; to maintain, repair and replace walks, paving, playground equipment, landscaping and other improvements, if any, on all open spaces; to mow open spaces; to obtain and maintain liability

property and business of Emerald Ridge. (D.I. 1, ex. By-Laws of Emerald Ridge Service Corporation, ¶ 4.) Plaintiff was a Director on the Board until January 15, 2004, when she resigned from the *Board Brooks-McCollum v. Shareef, No. Civ. A. 147 N, 2004 WL 1752852, at *1 (Del. Ch. July 2004)*. Plaintiff contends that she rescinded her resignation on February 7, 2004. Id.

At the time that Plaintiff serve d as a Director, Ken Shareef ("Shareef"), who believed he was a Board member and who claimed the position of President, asked Plaintiff to power-wash some monuments. (D.I. 96, ex. A, 17-18) The power-washing was performed and Plaintiff paid $185.00 for the service. (Id. At 18-19) Certain Board members, whom Plaintiff asserts were "non elected", refused to reimburse her, claiming that Plaintiff was only asked to obtain a quote. (Id. At 20-21) Sometime later the Board agreed to pay Plaintiff the $185.00, but she refused payment claiming the Board was not authorized to give her money from Emerald Ridge. (Id. At 22, 40-41)

Plaintiff contends that the Board members were not properly elected and that she was the only properly elected Director Prior to her resignation from the Board, Plaintiff filed a lawsuit in the Delaware Chancery to determine who the legal elected directors. (Id. At 1, *Brooks McCollum v. Shareef, 2004 WL 1752852, at *1)* One of Plaintiff's counts in her Chancery Court complaint was a claim to recover her expenses of $185.00 (id. At 16, 23.) According to Plaintiff, that portion of the case was transferred to the Superior Court. (Id. At 23.) Plaintiff has filed several other lawsuits,

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and other insurance, to promulgate and enforce rules and regulations, to accept responsibility (if same is assigned and declared), to enforce existing restrictive covenants, and to accept and hold title to roads, streets, open spaces and storm water management systems, all for and in connection with the real estate development or subdivision known as Emerald Ridge, New Castle County, Delaware, and to levy assessments and take all other actions necessary, desirable or incident to accomplish and exercise Emerald Ridge' purposes, powers and duties. (D.I. 113, ex. N, ¶ 4.)

in this Court as well as in Delaware State Courts, all relating in some way to the "power-washing" incident.[3] In this regard, she seeks indemnification for expenses in pursuing these litigations.

Defendant issued an insurance policy to Emerald Ridge, No. 98-BN-7398-8. As the insurer of Emerald Ridge, Defendant is providing a defense to Emerald Ridge and to the various Board members. Plaintiff seeks indemnification and contends that she should be indemnified or paid by Defendant for other lawsuits she has filed.

Plaintiff also alleges that Defendant damaged her property and harassed her and her family. During her deposition. Plaintiff testified that Defendant funded individuals who claimed to be directors and they harassed her family. (Id. At 46.) When asked if she saw anyone vandalize her property, Plaintiff testified the vandals were Board members, but she refused to name them, and invoked the fifth amendment. (Id. At 47-51.) Plaintiff also testified that she believed Defendant was involved because she received an anonymous letter sent from inside the State of Maryland, and Defendant is located in Maryland. (Id. At 51-52) Plaintiff also testified she received several phone calls that came from Maryland. (Id. At 52-56.)

Plaintiff did not respond to a request for admissions, and therefore, it is deemed admitted she has no evidence to

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[3] The cases include *Brooks-McCollum v. Shareef, No. Civ. A. 147-N (Del. Ch.) filed Jan. 2, 2004 and currently pending; dismissed cases Brooks-McCollum v. Emerald Ridge Serv. Corp., No. 04C-03-074 (Del Super. Ct.), aff'd 875 A.2d 632 (Del. 2005), Brooks-McCollum v. State Farm Ins. Co., No. 04C-03-075 (Del. Brooks-McCollum v. State Farm Ins. Co., No. 04C-03-075 (Del. Super. Ct.), and Brooks-McCollum v. Shareef, Civ. Action No. 04-1419-JJf (D. Del. Aug. 15, 2005) aff'd, 213 F. App'x 92 (3d Cir 2007) (not reported); stayed case Brooks-McCollum v. Shareef, C.A. No. 05C-12-198 MMJ; and removed and remanded case Brooks-McCollum v. Emerald Ridge Serv. Corp. Bd. Of Directors, Civ Action 04-703-JJF (D.Del. Jan. 11, 2005), aff'd, 166F App'x 618 (3d Cir. 2006) (not reported).*

indicated Defendant or any of its employees or agents performed any act of vandalism on her property; and, that she has no evidence that indicated that Defendant or any of its employees or agents performed any act of harassment in any manner on Plaintiff or a member of Plaintiff's family. (D.I. 86, ex. B.)

In her Motion For Summary Judgment, Plaintiff describes the issues as: 1) does a Director defending a very hostile takeover of Emerald Ridge, warrant indemnification pursuant to the subject insurance policy, the certificate of incorporation, and Emerald Ridge's By-law[4] ; and 2) whether Defendant, through its attorneys, funding, actions, and encouragement of illegal activities, is responsible as a joint tortfeasor.

Defendant moves for summary judgment arguing that there are no disputed facts and it is entitled judgment as a matter of law. Plaintiff moves for summary judgment arguing that she is a properly elected Director of Emerald Ridge and, as a Director and a party filing a lawsuit, she is entitled to insurance coverage. She also asks the Court for a finding that Defendant is a joint tortfeasor.

II. STANDARD OF REVIEW

In pertinent part, Rule 56© of the Federal Rules of Civil Procedure provides that a party is entitles to summary judgment if a court determines from its examination of "the pleadings, depositions, answers to interrogatories, and admissions on file together with the affidavits, if any," that there are no genuine issues of material fact and that the

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[4] Section 25, subsection I of Emerald ridge's by-laws relating to indemnification provides a narrow right to advancement of legal expenses. *Brooks-McCollum v. Shareef, No. Civ. A. 147-N, 2004 WL 1752852, at * (Del. Ch. July 29, 2004)*. Subsection IV provides that "the Corporation may maintain insurance, at its expense, protect itself and any such Director, officer, employee or agent,...against such expense, liability, or loss, whether or not the Corporation would have the power to indemnify such person against such expense, liability or loss under the Delaware General Corporation Law. (D.I. 1, ex. By-Laws of Emerald Ridge Service Corporation, ¶ 25, IV.)

moving party is entitled to judgment as a matter of law. Fed.R.Civ.P.56(c). In determining whether there is a triable dispute of material fact, the Court must review all of the evidence and construe all inferences in the light most favorable to the non-moving party. However, a court should not make credibility determinations or weigh the evidence. *Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 150 (2000)*. To properly consider all of the evidence without making credibility determinations or weighing the evidence, a "court should give credence to the evidence favoring the nonmovant a swell as that evidence supporting the moving party that is uncontradicted and unimpeached, at least to the extent that that evidence comes from disinterested witnesses." Id. At 151 (internal citations omitted). To defeat a motion for summary judgment, the non-moving party must "do more than simply show that there is some metaphysical doubt as to the material facts.... In the language of the Rule, the non-moving party must come forward with specific facts showing that there is a genuine issue for trial." *Matsushita Elec. Indus. Co., Ltd. V. Zenith Radio Corp., 475 U.S. 574, 586-87 (1986) (internal citations omitted)*. However, the mere existence of some evidence in support of the non-movant will not be sufficient to support a denial of a motion for summary judgment; there must be enough evidence to enable a jury to reasonably find for the non-movant on that issue. *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986)*. Thus, if the evidence is "merely colorable, or is not significantly probative," summary judgment may be granted. Id.

III.DISCUSSION

A. Indemnification

Plaintiff argues that she was the only official Director of Emerald Ridge, and therefore, the only person entitled to indemnification. She argues that she attempted to protect Emerald Ridge from a hostile takeover funded and executed by Defendant and its

lawyers. She contends that when Defendant chose to ignore Emerald Ridge's wishes to pay out all costs expended by Plaintiff on behalf of Emerald Ridge and advised others not to adhere to Emerald Ridge's wishes it became a "borderline torfeasor[]." (D.I. 112, 4.) Plaintiff relies on Delaware case law for the proposition that she is entitled to insurance coverage as a valid Director and a party bringing suit. She also relies on Delaware Corporation Laws, specifically 8 Del C. §145 which provides for indemnification of officers, directors, employees, and agents.

Conversely, Defendant argues that the insurance policy in question provides no right tot indemnification to Plaintiff since she was not legally obligated to pay damages. Defendant contends that Plaintiff's claim for indemnification is a matter between her and Emerald Ridge, rather than a matter under Emerald Ridge's insurance policy. Defendant further argues that Plaintiff did not raise a factual issue to defeat Defendant's Motion For Summary Judgment.

In the Court's view Plaintiff appears to confuse the Delaware statute that provides for corporate indemnification with indemnification in the context of an insurance policy. *See 8 Del. C. §145; Hibbert v. Hollywood Park, Inc., 457 A.2d 339 (Del. 1983)* (interpreting §145 as permitting statutory indemnification of expenses incurred by current or former directors who initiated a lawsuit in their own names, against other directors, where the suit was brought, at least in part, to fulfill their own fiduciary obligations to the corporation; *Shearin v. E.F. Hutton Group, 652 A.2d 578 (Del. Ch. 1994)* (holding that permissible claims for indemnification or advancement will include those deriving from lawsuits brought by directors, officers, etc., only insofar as the suit was brought as part of the indemnities' duties to the corporation and its shareholders).

Because Plaintiff seeks coverage under the insurance policy issued by Defendant, the Court must look to its provisions. While the duty to defend and the duty to indemnify under a contract of insurance are similar, there are critical distinctions which a court must recognize notwithstanding their commonality. In that regard, it has been has held that while the duty to defend and the duty to indemnify obviously bear some relationship, they are independent of one another. *Consolidated Rail Corp. v. Liberty Mut. Ins. Co., No. 97C-10-001 CHT, 2005 WL 697943 (Del. Super. Ct. 2005) (citing Charles E. Brohawn & Bros., Inc. v. Employers Commercial Union Ins. Co., 409 A.2d 1055 (Del. 1979)*. The duty to defend, moreover, is broader than the duty to indemnify. Id. The former is said to include the duty to defend any litigation that includes a potentially covered claim. ID. (citations omitted). Indemnification, absent some affirmative defense or other manner of avoidance, is based solely upon the terms of the contract of insurance." Id. (citations omitted). (citations omitted).

Under Delaware law, the interpretation of an insurance contract is a question of law in the absence of any dispute of material fact. *Collins v. State Farm Mut. Auto. Ins. Co. 830 A.2d 1241, 1245 (Del. Super. Ct. 2003) (citing Judge v. State Farm Ins. Cos., No. Civ. A. 92-C-03-010, 1993 WL 1611307 (Del. Super. Ct. 1993))*. "All provisions of a policy are to be read together and construed according to the plain meaning of the words involved, as to avoid ambiguity while at the same time giving effect to all provisions." *Hercules Inc. v. Onebeacon America Ins. Co., 852 A.2d 33, 35 (Del. Super Ct. 2004) (citing Delaware County Constr. Co. v. Safeguard Ins. Co., 209 P. Super. 502, 228 A.2d 15 (Pa. Super. Ct. 1967))*.

Clear and unambiguous language will be given its ordinary and usual meaning. *McKnight v. USAA Cas.*

Ins. Co., 871 A.2d 446, 448 (Del. Super. Ct. 2005) (citations omitted). Absent some ambiguity, Delaware courts will not destroy or twist policy language under the guise of construing it. Id. When the language of a contract is clear and unequivocal, a party will be bound by its plain meaning because creating an ambiguity where none exists could, in effect, create a new contract with rights liabilities and duties to which the parties had not assented. Id. (citations omitted). A contract is not rendered ambiguous simply because the parties do not agree upon its proper construction. *Lorillard Tobacco Co. v. American Legacy Found., 903 A.2d 728, 739 (Del. 2006)*. Rather a contract is ambiguous only when the provisions in controversy are reasonably or fairly susceptible of different interpretations or may have two or more different meanings. Id. Ambiguity does not exist where a court can determine the meaning of a contract without any other guide than a knowledge of the simple facts on which, from the nature language in general, its meaning depends. Id. Courts will not torture contractual terms to impart ambiguity where ordinary meaning leaves no room for uncertainty. ID. The true test is not what the parties to the contract intended it to mean, but what a reasonable person in the position of the parties would have thought it meant. Id. *(citing Rhone-Poulenc v. American Motorists Ins. Co., 616 A.2d 1192, 195-96 (Del. Super. Ct. 1990)*. Any doubt surrounding the construction of the policy language or the extent of coverage must be interpreted in the light most favorable to the insured. *Keystone Ins. Co. v. Walls, C.A. No. 03C-01-055 CHT, 2006 WL 1149143, at *5 (Del. Super. Ct. 2006) (citing Twin City Fire Ins. Co. v. Delaware Racing Ass'n 840 A.2d 624, 630 (del. 2003))*.

The Defendant issue to Emerald Ridge a condominium/association business liability insurance policy. (D.I. 1, ex. Insurance Policy) Comprehensive

Business Liability, Section II, Coverage L, provides that Defendant will pay "those sums that the insured becomes legally obligated to pay as damages because of bodily injury, property damage, personal injury or advertising injury to which this insurance applies. No other obligations or liability to pay sums or perform acts or services is covered unless explicitly provided for under Supplementary Payments." (Id. at 18.) Under the Supplemental Payments Section, the policy provides payment, with respect to any claims or suit, Defendant defends. (Id. at 19.)

The policy applies only to bodily injury or property damage, personal injury, and advertising injury committed in the course of advertising Emerald Ridge's goods, products or services, but excludes coverage to bodily injury or property damage expected or intended form the standpoint of the insured or to any person or property which is the result of willful and malicious acts of the insured. (Id. at 18-19) Finally, Section II provides that Defendant has the right and duty to defend any claim or suit seeking damages payable under this policy even though the allegations of the suit may be groundless, false, or fraudulent. (Id. at 18.)

The policy contains option directors and officers liability coverage ("OPTIONDO") and provides that the optional coverage is subject to all of the terms and conditions applicable to Section II of the policy, except as otherwise provided. The "OPTION DO" liability portion provides that Defendant will pay those sums "that the insured becomes legally obligated to pay as damages because of 'wrongful acts' committed by an insured solely in the conduct of their management responsibilities for the Condominium Association." (Id. at 24.) Insured is defined as any of Emerald Ridge's directors or officers, collectively and individually, which form the administrative body. (Id.) The officers and directors are insured only with respect to their duties as

officers or directors. (Id. at form 3.) A wrongful act is defined as any negligent act, error, omission or breach of duty directly related to the operations of the Condominium/Association. (Id. at 24.)

According to the provisions of the policy, Defendant agrees to pay those sums that the insured becomes legally obligated to pay as damages because of bodily injury, property damage, personal injury, or advertising injury to which this insurance applies. No other obligation or liability to pay sums or perform acts or services is covered unless explicitly provided for under Supplementary Payments which provides for payment with respect to any claims or suit that Defendant defends. The terms of the policy are unambiguous. It will pay those sums that the insured becomes legally obligated to pay. It does not, however, provide benefits to an insured against whom no claim has been brought. Nor does it provide coverage to an insured who files an action. It is clear from the record that Plaintiff is the one seeking damages, not the person being sued for any damages by any entity. Hence, she is not legally obligated to pay any claim. Finally, Plaintiff is not a defendant in any action and, therefore, Defendant is not obligated to provide her a defense.

There is not a cause of action wherein Plaintiff is a defendant under which to provide her with insurance coverage. Consequently, there is no duty to indemnify Plaintiff for any claims raised against her. Accordingly, as to the issue of indemnification, the Court will grant Defendant's Motion For Summary Judgment and will deny Plaintiff's Motion For Summary Judgment.

B. Joint Tortfeasors

Plaintiff asks the Court for a finding that Defendant, through its attorneys, funding, actions, and encouragement of illegal activities is responsible as a joint tortfeasor in this lawsuit. Defendant submits that Plaintiff has filed several actions against other

individuals in various Delaware courts but, apparently, she neither understands the joint tortfeasor statute, nor its application. Defendant argues that it is unaware of any personal injury claim by Plaintiff. Finally, Defendant moves for summary judgment arguing that Plaintiff has no evidence that it harassed Plaintiff or damaged her property.

A Joint tortfeasor is defined by relevant statute as meaning "2 or more persons jointly and severally liable in tort for the same injury to person...whether or not judgment has been recovered against all or some of them." 10 Del. C. §6301. Plaintiff asserts that Defendant, along with other parties, acted as a joint tortfeasor through its own knowledge and support of criminal behavior and terrorist acts.

Although Plaintiff contends that certain Board members are responsible for these alleged acts, she refuses to name the Directors. Further, it is deemed admitted that Plaintiff has no evidence to support her claim that Defendant vandalized her property or harassed her. Thus, while construing the evidence in light most favorable to Plaintiff, as the Court must, the Court concludes that no evidence has been adduced to support a finding that Defendant is a joint tortfeasor, or that Defendant damaged Plaintiff's property or harassed her. Therefore, the Court will grant Defendant's Motion For Summary Judgment and will deny Plaintiff's Motion For Summary Judgment.

IV. CONCLUSION

Based upon the foregoing, the Court will grant Defendant's Motion For Summary Judgment and will deny Plaintiff's Motion Summary Judgment. (D.I. 85, 112.) The Court will deny as moot Plaintiff's Motion To Compel and Motion To Strike and Defendant's Motion To Quash Subpoena.

An Appropriate Order will be entered.

NOT PRECEDENTIAL
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
No. 05-1264
CATHY D. BROOKS-MCCOLLUM. on behalf of
Emerald Ridge Service Corporation
Derivative Action as a Director,
Appellant

v.

EMERALD RIDGE SERVICE CORPORATION
BOARD OF DIRECTORS, Excluding Plaintiff;
KENNETH SHAREEF; RENFORD BREVETT;
MAUDY MELVILLE; VALERIE LONGHURST;
MARK MARTELL; RUTH VIVARDIS;
FERRY JOSEPH &. PEARCE; EDWARD KAFADER
Appeal from the United States District Court
for the District of Delaware
(D.C. Civil No. 04-cv-00703
District Judge: Honorable Joseph J. Farnan, Jr.
Submitted Under Third Circuit LAR 34,1(a)
December 8, 2005
Before: RENDELL, FISHER and GREENBERG, Circuit
Judges(Filed: February 10, 2006)
OPINION OF THE COURT

RENDELL, Circuit Judge.

This case arises out of a dispute between Cathy Brooks-McCollum. a resident of the Emerald Ridge residential development in Bear, Delaware, and the Board of Directors of the corporation that manages the development, Emerald Ridge Service Corporation ("Emerald Ridge). Brooks-McCollum originally sued the

directors in the Delaware Court of Chancery and Delaware Superior Court. alleging various breaches of the directors' fiduciary duties to the corporation. After the Chancery Court denied Brooks-McCollum's motion for advancement of legal fees from Emerald Ridge for the cost of pursuing her claims, Brooks-McCollum filed the complaint in this case against the board of directors of Emerald Ridge, the individual directors and the attorney and law firm that represented the directors before the Delaware Chancery Court. The District Court dismissed her claims for lack of subject matter jurisdiction. and she now appeals. We will affirm.

Brooks-McCollum asserts that the District Court had federal question jurisdiction. Yet her complaint alleges quintessential state law causes of action: slander, violations of provisions of the Delaware criminal code, questions of corporate governance, and violations of the Delaware Code of Professional Conduct. Her citation of various

It is unclear whether Brooks-McCollum also appeals the District Court's denial of her motion to amend her complaint. In any event. we find that the District Judge acted within his discretion when he denied the motion because Brooks-McCollum failed to comply with local rules requiring, the plaintiff to provide the court with a copy of the proposed amendments. *See Lake v. Arnold. 232 F.3d 360, 374 (3d Cir. 2000)* (concluding that failure to provide a draft amended complaint would be an adequate basis on which" a district court could deny plaintiffs motion to amend).

Constitutional and federal statutory provisions do not transform these state law claims into causes of action "arising under" the Constitution or federal law. 28 U.S.C. § 1331. As the District Court properly noted, the statutes that Brooks-McCollum cites are largely irrelevant-they are either non jurisdictional, e.g.. 28 U,S.C. 1391, 1401 (regarding venue), or unrelated to the allegations of her

complaint, e.g., 28 U.S.C, § 1357 (jurisdiction over revenue and voting rights cases); id. at § 1344 (jurisdiction over election disputes): id. at § 1350 (jurisdiction over alien tort claims).

Brooks-McCollum's appeals to the Constitution are similarly unavailing. The Supreme Court has repeatedly "insisted that the conduct allegedly causing the deprivation of a federal right be fairly attributable to the *State." Lugar v. Edmonson Oil Co., 457 U.S. 922, 937 (1982)*. Thus.

[T]he party charged with the deprivation must be a person who may fairly be said to be a state actor. This may be because he is a state official, because he has acted together with or has obtained significant aid from state officials, or because his conduct is otherwise chargeable to the State.

Id. The defendants in this case, the hoard and individual directors of a private corporation, and their attorneys. do not in any way qualify as "state actors."

"The person asserting, jurisdiction bears the burden of showing that the ease is properly before the court at all stages of the litigation", *Packard v. Provident Vat 7 Bark, 994 F.2d 1039, 1045 (3d Cir. 1993)*. Because Brooks-McCollum has not set forth any basis upon which we could conclude that the District Court had, jurisdiction, we will affirm the dismissal of her complaint.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

Civil Action No. 04703 JJF

CATHY D. BROOKS-MCCOLLUM, Plaintiff,

v.

EMERALD RIDGE SERVICE CORP. BD. OF DIR., et al.,
Defendants.

MEMORANDUM ORDER

Pending before the Court is Plaintiff's Motion For Reargument And Correction Of District Court's Error. (D.I. 61.) For the reasons set forth below, the Court will deny the Motion.

By her Motion, Plaintiff requests the Court to reconsider that portion of its Order dated August 25, 2005 (D.I 60) denying Plaintiff's previous Corrective Motion (D.I. 52). By that Motion, Plaintiff had requested the Court to amend the caption of the pleadings to show Emerald Ridge Service Corporation as a plaintiff rather than a defendant. The Court, citing *Maldonado v. Flynn, 413 A.2d 1251, 1255 (Del. Ch. 1980)*, concluded that in a shareholder derivative suit under Delaware law, the corporation is named as a nominal defendant. Therefore, the Court denied the Motion.

Motions for reargument or reconsideration "should be granted sparingly" and may not be used merely to repeat arguments that

Have already been briefed by the parties and considered and decided by the Court. *Ciena Corp. v. Corvis Corp., 352 F.Supp.2d 526, 528 (D. Del. 2005).* In the instant Motion, Plaintiff's argument is essentially the same

as the one she presented in her original Corrective Motion (D.I. 52). Therefore the Court having already considered Plaintiff's argument and decided the issue, will deny the Motion.

NOW THREFORE, IT IS HEREBY ORDERD that Plaintiff's Motion For Reargument And Correction Of District Court's Error (D.E. 61) is DENIED

November 4, 2005 /s/ Joseph J. Farnan Jr.
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

CATHY D. BROOKS-MCCOLLUM, Plaint
Civil Action No. 04-703 JJF
EMERALD RIDGE SERVICE
CORPORATION
v, KENNETH SHAREEF, RENFORD BREVETT, RUTH VIVARDIS, MAUDY MELVILLE, VALERIE LONGHURST, MARK MARTELL, FERRY, JOSEPH & PEARCE, EDWARD E. KAFADER,

Defendants.

MEMORANDUM ORDER

On January 11, 2005, the Court issued a Memorandum Opinion (0.I. 47) and Order D.I. 48) granting Defendants' Motions To Dismiss (D.I. 34 and 37) for lack of federal subject matter jurisdiction. Subsequently, Plaintiff filed the following four motions. For the reasons discussed, the Court deny the Motions.

I. Plaintiff's Motion To Correct The Content Of The Paragraph Labeled Background (D.I. 49)

Plaintiff has filed a Motion To Correct The Content Of The Paragraph Labeled Background (D.I. 49). Because Plaintiff restates this Motion in her subsequent Corrective Motion (D. 52), the Court will address this contention below with the Corrective Motion.

II. Plaintiff's Corrective Motion (D.I. 52) Plaintiff's Corrective Motion (D.I. 52) contains the following requests.[5]

[5] Defendant's construe Plaintiff's corrective motions as motions to alter or amend judgment and contend that they are untimely filed because they were required to be filed within 10 days of the docketing of the Court's January 11, 2005 order. However, the Court's January 11, 2005

A. Plaintiff's request that the Court correct the caption

Plaintiff requests that the Court amend the caption of the pleadings such that "Plaintiff" is changed to "Plaintiff(s)" to include Emerald Ridge Service Corporation. The Court concludes, however, shareholder derivative action brought under Delaware law, the corporation is named as nominal defendant, rather than as a plaintiff. *Maldonado v. Flynn, 413 A.2d 1251, 1255 (Del. Ch, 1980)*, rev'd on other grounds, *Zapata Corp. v. Maldonado, 430 A.2d 779 (Del. 1981)*. Further, the Court notes that the captions the Complaint as it was filed. Accordingly, the Court will deny Plaintiff's request to amend the case caption.

B. Plaintiff's request that the Court correct is Order denying Plaintiffs' Motion to Amend

In its January 11, 2005, Memorandum Opinion and Order, the Court denied Plaintiffs Motion To Amend Complaint (0.1. 44) for failing to comply with the requirement of Local Rule 15.1. Plaintiff contends that the Court should correct the Order because (1) the Court's January 11,2005, Memorandum Opinion treated the Complaint as amended and (2) Plaintiff complied with Rule 15.1 because she included the amendments in her Civil Cover Sheet and in her brief. The Court concludes, however, that Plaintiff did not comply with Rule 15.1, because her Motion failed to enclose a copy of the pleading as proposed to amend. Accordingly, the Court will deny Plaintiff's request for correction.

C. Plaintiff's request. that the Court correct the section of the Memorandum Opinion entitled Background

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Order was not docketed until January 14, 2005, and there was a federal holiday on January 17, 2005. Accordingly, Plaintiff's motions, if construed as Rule 59(e) motions, were due on January 31, 2005, and thus, they are timely.

In the Background section of its January 11, 2005, Memorandum Opinion, the Court referred to Plaintiff as a "former" member of the Board. Plaintiff contends that she is a current member of the Board and that the Memorandum Opinion should be revised to reflect this fact. The Court concludes that the reference to Plaintiff as a former member of the Board is not critical to the Court's decision, and therefore, the Court will deny Plaintiff' s request for a correction of the Court's decision.

D. Plaintiff's request that. the Court correct its opinion private individuals cannot be sued as part of the violations committed by Defendants

Next, Plaintiff contends that the Court's January 11, 2005, Memorandum Opinion erroneously held that private individuals cannot be sued under 42 U.S.C. § 1983. Because Plaintiff restates this contention in her subsequent Motion For Reconsideration Of Stay (P.1. 53) the Court will address this issue in full in its discussion of the Motion for Reconsideration of Stay.

E. Plaintiff request that the Court rule on if Delaware Court has jurisdiction over Plaintiff's state law claims

Finally, Plaintiff contends in her Corrective Motion that the Court should rule on which Delaware Court has jurisdiction over Plaintiff's state law claims. The Court, however, has ruled that it does not have subject matter jurisdiction over the instant action. Thus, the Court cannot direct Plaintiff to a Delaware state court that may have jurisdiction over Plaintiff's state law claims. Accordingly, the Court will deny Plaintiff's request.

III. Plaintiff's Motion For Reconsideration Of Stay (D.I. 53)

Plaintiff also filed a Motion For Reconsideration Of Stay contending that the Court erred in its decision that private individuals cannot be sued under section 1983. Plaintiff, however, misunderstands the Court's reasoning. Plaintiff is correct that a section 1983 claim may be brought

against an individual. However, such a claim requires the individual to have been acting under "color" of state law when the alleged deprivation of the constitutional right occurred. *Gonzaga Univ. vs. Doe, 536 U.S. 273, 284-85 (2002)* (recognizing that Section 1983 is not a source of substantive rights, but a means to redress violations of federal law by state actors) . Plaintiff has failed to establish that the individual Defendants were state actors or that they acted under color of state law[6] Accordingly. the Court deny Plaintiff's Motion For Reconsideration.

IV. Plaintiff's Motion To Correct (D.I. 54)

Finally, Plaintiff filed a Motion To Correct (D.I. 54) contending that the Court should change the caption of the case to read "Cathy D. Brooks-McCollum & for Emerald Ridge Service Corporation (Derivative)." For the reasons discussed earlier,

Court will deny Plaintiff's request to amend the caption of this action.

NOW THEREFORE, IT IS HEREBY ORDERED this (8th day of August 2005, that:

1. Plaintiff's Motion To Correct The Content Of The Paragraph Labeled Background (D.I. 49) is DENIED.

2. Plaintiff's Corrective Motion (D.I. 52) is DENIED.

3. Plaintiff's Motion For Reconsideration Of Stay (D.I. 53) is DENIED.

4. Plaintiff's Motion To correct (D.I. 54)

Plaintiff cites to *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971).* Under Bivens, an individual may be sued for unconstitutional conduct, if the conduct was committed by

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[6] Plaintiff cites to Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971). Under Bivens, an individual may be sued for unconstitutional conduct, if the conduct was committed by an individual as a federal official acting under color of federal law. However, Plaintiff has made no allegations to support a Bivens claim.

an individual as a federal official acting under color of federal law. However, Plaintiff has made no allegations to support a Bivens claim.

/s/ Joseph J. Farnan, Jr.
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE

Civil Action No. 0,4-703 JJF

CATHY D. BROOKS-MCCOLLUM,
Plaintiff,
v.
EMERALD RIDGE SERVICE CORPORATION, KENNETH SHAREEF, RENFORD BREVETT, RUTH VIVARDIS, MAUDY MELVILLE, VALERIE LONGHURST, MARK MARTELL, FERRY, JOSEPH & PEARCE, EDWARD F. KAFADER,

Defendants.

Cathy D. Brooks-McCollum, Bear, Delaware. Pro se Plaintiff.

Jonathan L. Parshall, Esquire, of MURPHY SPADARO & LANDON, Wilmington, Delaware.

Attorneys for Defendants Emerald Ridge Service Corporation, Kenneth Shareef, Renford Brevett, Ruth Vivardis, Maudy Melville, Valerie Longhurst, and Mark Martell.

Robert K. Pearce, Esquire, and Rick S. Miller, Esquire, of FERRY, JOSEPH & PEARCE, PA, Wilmington, Delaware.

Attorneys for Defendants Edward F. Kafader and Ferry, Joseph & Pearce, PA.

MEMORANDUM OPINION

January 11, 2005

Wilmington, Delaware

/s/ Farnan, District Judge

Pending before the Court are (1) Defendants Emerald Ridge Service Corporation Board of Directors, Kenneth Shareef, Renford Brevett, Maudy Melville, Valerie Longhurst, Mark Martell, And Ruth Vivardis Motion To Dismiss Or Remand For Lack Of Federal Jurisdiction (D.I. 34) and (2) Defendants Edward F. Kafader and Ferry, Joseph, & Pearce, P.A. Motion To Dismiss the Complaint (D.I. 37). For the reasons discussed, Defendants' Motions will be granted.

BACKGROUND

Plaintiff Cathy Brooks-McCollum is a former officer and director of the Emerald Ridge Service Corporation (the "Corporation). Following a vote by the Corporation's Board of Directors to remove Plaintiff as an officer, Plaintiff filed a complaint in the Delaware Court of Chancery. Plaintiff subsequently filed a complaint in the Delaware Superior Court, which the Superior Court dismissed with prejudice. Plaintiff filed the instant action against Defendants on behalf of the Corporation.

PARTIES' CONTENTIONS

By their motions, Defendants contend that the Court lacks subject matter jurisdiction over Plaintiff's claims. Defendants contend that: (1) the parties lack complete diversity; and (2) Plaintiff has not alleged a federal question.

In response, Plaintiff concedes she lacks federal diversity jurisdiction (D.I. 39 at 9, 1 18), but cites several federal laws in support of federal question jurisdiction, including the First, Fifth, Sixth, Seventh. and Fourteenth Amendments; 28 U.S.c § 1401; 28 U.S.C. §§ 87, 97, and 85; Federal Rule of Civil Procedure 38; 18 U.S.C. §§ 1964 and 1965 (the "RICO statute"); 42 U.S.C. § 1985; 18 U.S.C. §§

241, 245; 28 U.S.C. §§ 1335, 1343, 1344, 1350, 1357, 1367, 1391, 1401; 42 U.S.C. § 1971; 15 U.S.C. §§ 77v(a), 78u(c), and 78aa (the "Securities Exchange Act"); and 18 U.S.C. §§ 1952, 1957, and 1959.

DISCUSSION

Before determining the merits of the case, a district court must determine whether it has subject matter jurisdiction. *Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 94-95 (1998)*. Challenges to subject matter jurisdiction may be racial or factual attacks. When a defendant attacks subject matter jurisdiction on the allegations on the face of the complaint, as is the case here, the challenge is a facial attack. *Carpet Group Int'l v. Oriental Rug Importers Assn, 227 F.3d 62, 69 (3d Cir.2000)*. When examining a facial attack to subject matter jurisdiction, the court must accept plaintiff's allegations as true, and not look beyond the face of the complaint to determine jurisdiction. *Mortenson v. First Fed. Say. and Loan Ass'n, 549 F.2d 884,891 (3d Cir.1977)*. The party asserting subject matter jurisdiction has the burden of proving its existence. Carpet

Group Int'l, 227 F.3d at 70.

Federal subject matter jurisdiction is generally premised on two grounds: (1) a federal question involving the Constitution or laws of the United States, or (2) diversity of citizenship. See 28 U.S.C. §§ 1331 and 1332. In this case, Plaintiff alleges federal question jurisdiction. (D.I. 39 at 9, 18.)

Federal courts have federal question jurisdiction over "cases in which a well pleaded complaint establishes either that federal law creates the cause of action or that the plaintiff's right to relief necessarily depends on resolution of a substantial question of federal law." *Franchise Tax Bd. v. Constr. Laborers Vacation Trust, 463 U.S. 1, 27-28 (1983)*.

The Court concludes that none of the statutes or other authorities cited by Plaintiff establishes federal

subject matter jurisdiction. Many of the authorities cited by Plaintiff relate to topics other than jurisdiction, including venue (e.g., 28 U.S.C. § 1401), the location of courthouses (e.g., 28 U.S.C. §§ 87, 97, and 85), the Sixth Amendment right to a speedy and public trial in a criminal prosecution, the Seventh Amendment right to a jury trial, and criminal violations (e.g., 18 U.S.C. §§ 241, 245, 1344, 1952, 1957, and 1959). Other statutes cited by Plaintiff concern issues entirely unrelated to the allegations of the Complaint, for example, the collection of taxes (28 U.S.C. § 1357); the right to vote in elections (e.g., 28 U.S.C. § 1344, 42

U.S.C. § 1971); and actions by an alien for violations of the law of nations or of a treaty (e.g., 28 U.S.C. § 1350).

Plaintiff's assertion of supplemental jurisdiction pursuant to 28 U.S.C. § 1367 is without merit as supplemental jurisdiction requires an independent basis for federal jurisdiction. Also, Plaintiff does not allege facts in her Complaint with the particularity required to establish federal question jurisdiction by virtue of a violation of the RICO statute, 42 U.S.C. 1985, or the Securities Exchange Act. Finally, the Plaintiff's attempt to assert claims under the First, Fifth, and Fourteenth Amendment do not authorize federal question jurisdiction because those Amendments apply only to state action, not action by private individuals or entities. See Avallone v. Wilmington Medical Ctr., Inc., 553 F.Supp. 931 (D.Del. 1982).

CONCLUSION

For the reasons discussed, the Court will grant Defendants' Motions to Dismiss (D.I. 34, 37).1

An appropriate Order will be entered.

'Plaintiff's recent Motion to Amend Complaint (D.I. 44) will be denied as it fails to comply with the requirement of Local Rule 15.1 to enclose a copy of the pleading as proposed to amend.

IN THE UNITED STATES DISTRICT COURT FOR DISTRICT OF DELAWARE

CATHY D. BROOKS-MCCOLLUM,
Plaintiff,
v. Civil Action No. 04-703
JJF
EMERALD RIDGE SERVICE CORPORATION, KENNETH SHAREEF, RENFORD BREVETT, RUTH VISVARDIS, MAUDY MELVILLE, VALERIE LONGHURST, MARK MARTELL, FERRY, JOSEPH & PEARCE, EDWARD F. KAFADER,
Defendants.

O R D E R

At Wilmington, this 11th day of January 2005, for the reasons set forth in the memorandum Opinion issued this date;

IT IS HEREBY ORDERED that:

1) Defendants' Emerald Ridge Service Corporation Board of Directors, Kenneth Shareef, Renford Brevett, Maudy Melville, Valerie Longhurst, Mark Martell, And Ruth Vivardis Motion To Dismiss Or Remand For Lack Of Federal Jurisdiction (D.I. 34) is GRANTED;

2) Defendants' Edward F. Kafader and Ferry, Joseph, & Pearce, P.A. Motion To Dismiss the Complaint (D.I. 37) is GRANTED;

3) All other pending motions are DENIED as moot.

January 11, 2006 /s/Joseph J. Farnan, JR.
UNITED STATES DISTRICT
COURT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

CATHY D. BROOKS-MCCOLLUM, on, behalf of Emerald Ridge Service Corp. Derivative Action as a Director,

Plaintiff,

v. Civil Action No. 04-703-JJF

EMERALD RIDGE SERVICE
CORPORATION BOARD OF DIRECTORS,
KENNETH SHAREEF, RENFORD
BREVETT, MAUDY MELVILLE,
VALERIE LONGHURST, MARK MARTELL,
RUTH VIVARDIS, FERRY JOSEPH & PEARCE
and EDWARD KAFADER,

Defendants.

O R D E R

WHERAS, the court conducted a Rule 16 Scheduling Conference on Thursday, September 9, 2004:
NOW THEREFORE, IT IS HEREBY ORDERED that:
1) All motions in this case are STAYED pending a decision on the Defendant's Motions to Dismiss.
2) Plaintiff shall file her Answering Brief(s) to the Motions to Dismiss within thirty (30) days of receipt of the Motions.
3) Defendants shall file a Reply Brief within ten (10) days of receipt of an Answering Brief.

September 14, 2004 */s/* Joseph J. Farnan, Jr.

UNITED STATES DISTRICT JUDGE

COURT OF CHANCERY OF THE
STATE OF DELAWARE

Date Submitted: April 2, 2004

Dated Decided: July 29, 2004

Re: Brooks-McCollum v. Emerald Ridge Service Board Of Directors, et al., - Civil Action No. 147-N

Dear Ms. Brooks-McCollum and Counsel:

Cathy Brooks-McCollum ("Petitioners"), pro se, filed a Motion to Compel Indemnification on March 18, 2004.[7] Petitioner's Motion arises out of claims she filed against certain current and former members of the board of directors ("Respondents") of the Emerald Ridge Service Corporation ("Emerald"). The Court reads Petitioner's self styled Motion to Compel Indemnification as a motion for advancement and for a declaration that she is entitled to indemnification in the circumstances of this case.[8]

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[7] This Court has jurisdiction under 8 Del. C. §145(k) to hear and determine all "actions for advancement of expenses or indemnification" in a summary proceeding. Petitioners brought her motion for indemnification as part of a larger action before any decision as to liability or any significant discovery has occurred. The procedural propriety of Petitioner's motion at this early stage of the litigation is discussed infra.

[8] On July 7, 2004, Petitioners filed a Motion for Reargument on Advancement on Advancement of Fees for Indemnification. In her motion, Petitioners incorrectly stats that, at a hearing on June 24, 2004 the Court "ordered that Petitioners was entitled to indemnification and a written order would be issued." In fact, at the June 24th hearing, the Court only expressed its preliminary view that Petitioners was not entitled to indemnification, it would not be for all of her claims. Petitioner's July 7th motion seeks reargument on the advancement issue. The Court, however, did not render a final ruling on either advancement or indemnification at the June 24th hearing.

Petitioners contend she is entitled to advancement from Emerald for the cost of pursuing numerous claims, including: unjust enrichment, breach of fiduciary duty, and slander. In addition, Petitioner's reply papers suggest that the pleadings, which are not yet closed, may include a request for relief under 8 Del. C. §225, as well.

Based on the numerous papers submitted by Petitioners, Respondents' response, and the arguments presented during the hearing on June 24, 204, the Court finds that Petitioners is not entitled to advancement. The Court also will deny without prejudice Petitioner's motion for a declaration that she is entitled to indemnification, on the ground that it is premature.[9]

I. BACKGROUND

Petitioner was elected a director of Emerald in June of 2003 and was appointed to serve as both Treasure and Secretary.[10] At a December 23, 2003 Board meeting, a unanimous Board voted to remove Petitioners from those positions.[11] Petitioners resigned from the Board on January 15, 2004.[12]

In Petitioners reply papers, Petitioners alleges that she rescinded Petitioners resignation on February 7, 2004.

Consequently, I will treat the Motion for Reargument as an additional submission in support of Petitioner's motion for indemnification and advancement.

[9] The Court's decision does not preclude Petitioners from filing a proper action for indemnification at the conclusion of this litigation.

[10] See Response to Respondents Reply to Indemnification & Response to Respondents Answer to Petitioner's More Definitive Statement ("PRB") at 17. Unless otherwise noted, the facts recited in this letter opinion are drawn from Petitioner's moving papers, which the Court assumes arguendo to be true. This is without prejudice to Respondents' ability to dispute in later proceedings any facts not otherwise admitted.

[11] See Petitioner's Response to Motion for More Definite Statement at 2. Petitioners disputes the validity of her removal. The factual assertions related to that issue, however, are not relevant to this motion.

[12] See Respondents' Renewal of Motion For More Definite Statement and Motion for Judgment on Pleadings ("Defs.' Renewal of Motion"), Ex.E.

and that she now is the only valid director of Emerald.[13] Respondents' submissions and argument make clear that they dispute Petitioner's status as a current board member and Petitioners claim to be the only valid board member. These issues go to the merits of the underlying dispute and are not ripe for decision at this time. For purposes of the motion for indemnification, it is undisputed that Petitioners was a director of Emerald until January 15, 2004. The Court will assess the motion on that basis. Whether or not Petitioners effectively rescinded Petitioners resignation and the potential ramifications of that action upon Petitioners claim for indemnification cannot be resolved until after the Court addresses the merits of this action.

On January 2, 2004, before she resigned, Petitioners filed Petitioners Complaint in this Court. On February 3, 2004, Respondents moved for a more definite statement. On February 9, 2004, Petitioners filed Petitioners response. In it and numerous other papers, Petitioners alleges that: (1) she was invalidly removed as an officer because Respondent Shareef was not a valid director; (2) Emerald was unjustly enriched by requiring Petitioners to pay for a power washing service to clean community monuments; (3) the Board utilized funds for unauthorized purposes and disregarded the referendum directives made by the members of the corporation; (4) the Board improperly failed to permit inspection of Emerald's books and records; and (5) the Board made intentional, slanderous postings on Emerald's website. On March 5, 2004, Respondents renewed their motion for a more definite statement and moved for judgment on the pleadings. On March 9, Petitioners filed a self-styled amended complaint to add breach of contract claims against State Farm Insurance Company ("State Farm") and to assert various challenges to the identity of the properly elected directors of Emerald, as

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[13] PRB at 15.

well as several other new claims.[14] On March 18, Petitioners filed Petitioners Motion to Compel Indemnification.

In a telephone conference on March 29, 2004, the parties agreed to defer action on Respondents' pending motions and Petitioner's purported amended complaint until after Petitioner's Motion to Compel Indemnification was briefed and resolved. The Court provided its preliminary views on the advancement issues during a hearing on June 24, 2004 on another motion by Petitioners in this action.

II. ANALYSIS

A. Advancement

The Delaware General Corporation Law permits a corporation to advance the costs of litigation to a director.[15] This allowance is permissive, not mandatory.[16] Thus, a corporation is free to limit the terms of advancement and even preclude advancement entirely.

The Emerald bylaws relating to indemnification provide a narrow right to advancement of legal expenses.[17] Specifically, Section 225, subsection 1 of the bylaws provides in pertinent part:

> Right to Indemnification – Each person who was or is made a party or is threatened to be made a party to or is involved in any action, suit or proceeding, whether civil, criminal, administrative or investigative (proceeding"), by reason of the fact

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[14] Petitioners has not properly moved pursuant to Chancery Court Rule 15 for leave to file her amended complaint. Yet, she has included the proposed Amended Complaint in previous communications to the Court. Whether some, all or none of the new claims asserted in Petitioner's so-called amended complaint will be allowed remains to be determined.

[15] 8 Del. C. §1-45(e)

[16] See Tafeen v. Homestore, 2004 Del. Ch. LEXIS 38, 44 (2004), noting that corporations can draft narrow advancement bylaws.

[17] Defs.' Renewal of Motion, Ex.D at 14.

> that he or she or a person for who he or she is the legal representative is or was a Director or officer, employee or agent of the Corporation or is or was serving at the request of the Corporation as a Director or officer...shall be indemnified and held harmless by the Corporation to the fullest extent authorized by the Delaware General Corporation Law, as the same exists or may hereafter be amended...against expenses, liability and loss (Including attorneys fees, judgments, fines... Such right shall be a contract right and shall include the right to be paid by the Corporation expenses incurred *in defending any such proceeding* in advance of its final disposition; provided, however, that the payment of such expenses incurred by a Director or officer of the Corporation in his or Petitioners capacity as a Director or officer...shall be made only upon delivery to the Corporation of an undertaking, by or on behalf of such Director or officer, to repay all amounts so advanced if it should be determined ultimately that such Director or officer is not entitled to be indemnified under this section or otherwise.[18]

Thus, Emerald's bylaws set forth two substantive requirements for advancement. First, the expenses must be incurred in "Respondent" a proceeding such as this civil action.[19] Second, the individual requesting advancement must deliver to Emerald an undertaking to "repay all amounts so advanced if it should be determined ultimately that such Director or officer is not entitled to be indemnified."

Petitioners do not meet either of these two requirements. First, she is not defending this lawsuit; in fact, she initiated it. In Petitioners reply papers, Petitioners seems to argue that the advancement rights

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[18] Id., Ex. D (emphasis added).

[19] Id., Ex. D at 13

provided by the bylaws necessarily extend to every situation under which the bylaw might authorize indemnification.[20] The advancement explicitly is limited to persons "defending" an action. The language in the bylaws defining the scope of indemnification arguably might have broader application. For example, read most broadly, Section 25 would afford indemnification rights to: "Each person who was or is made a party or is threatened to be made a party to or is involved in any action, suit or proceeding...by reason of the fact that he or she... is or was a Director or officer, employee or agent of the Corporation." Whether or not Petitioners ultimately might qualify for indemnification under Section 25 as to some aspect of Petitioners claims, the Court concludes that the narrower language on advancement precludes Petitioners from receiving an advancement of Petitioners costs and expenses in this action.[21]

A second and independent basis exists for denying Petitioner's application for advancement. The bylaws require that she submit to the Corporation a formal undertaking to repay. Petitioners presented no evidence that she ever supplied the requisite undertaking. In fact, Petitioners reply papers indicate that Petitioners denies that the requirement to agree to repay advanced funds applies to Petitioners.[22] Petitioner's rationale is that Petitioners case on the merits as to the proper makeup of the board is so strong that there is no possibility that she ultimately will be determined not to entitled to indemnification. The Courts rejects this excuse for not providing the requisite undertaking.

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[20] PRB at 4.

[21] Petitioners also argues that she is "defending the accusations as a Petitioners wrongly accused." PRB at 20-21. Having considered the allegations in Petitioner's complaint and her moving papers, the Court is not convinced that there is any legitimate basis for characterizing her position in this litigation as one of "defending" within the meaning of the Emerald bylaws.

[22] PRB at 11-12

For both the above reasons, Petitioners has failed to prove a right to advancement.. Thus, the Court will deny that aspect of Petitioners motion.

B. Indemnification

In Petitioners Motion to Compel Indemnification and Petitioners argument on June 24, 2004 Petitioners has requested a ruling on Petitioners claimed right to indemnification. Even at this preliminary stage of the litigation, it seems clear that on at least some of Petitioners original claims and potential new claims in the proposed amended complaint, Petitioners will not be entitled to indemnification. For example, Petitioners claim of slander does not arise out of an obligation or duty to the corporation. Petitioners make this claim on Petitioners own behalf, asserting Petitioners personal rights, rather than as part of Petitioners responsibilities and duties as a director. To the extent indemnification might arguably be authorized by Emerald's bylaws in connection with a particular claim, that claim by Petitioners would have to arise out of Petitioners duty to the corporation.[23] Hence, Petitioners claim for slander would not be indemnifiable.

As to the remaining claims, Petitioner's right to indemnification evidently will be challenged on several grounds, including that she commenced this litigation

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[23] Shearin v. E.F. Hutton Group, Inc., 652 A.2d 578, 594 (Del. Ch. 1994) citing Hibbert v. Hollywood Park, Inc., 457 A.2d 339, 344 (Del. 1983) ("Thus, I take Hibbert to recognize that permissible indemnification claims will include those deriving from lawsuits brought by directors, officers, agents, etc., only insofar as the suit was brought as part of the employee's duties to the corporation and its shareholders.") The Court further stated that claims for slander or breach of contract, similar to the claims raised by Petitioners, do not arise out of duty to the corporation and are not thus not indemnifiable: "The suits brought by [Petitioners]...cannot be considered a manifestation of her responsibilities to [the indemnifying entity]. These suits plainly sought to advance [Petitioner's] own interest, not the interest of the [the indemnifying entity]...the litigation involves purely the assertion of Petitioner's personal rights (i.e., defamation, breach of contract), and thus advances no interest of, or duty to, [the indemnifying enty]." Id.

unlike most litigants who seek indemnification in their role as Respondents. The Delaware courts only rarely have authorized indemnification of Petitioners.[24] Whether the Emerald bylaws and the holdings in those cases provide a basis for granting indemnification to Petitioners in the circumstances of this case is likely to be hotly contested.[25]

It would be premature, however, for the Court to attempt to address those issues before the questions of liability are determined. Apart from the issue of advancement addressed above, courts understandably tend to defer deciding whether a party is entitled to indemnification until after the merits of the underlying dispute have been resolved.[26] The additional facts that the pleadings in this action are still incomplete and virtually no discovery has occurred yet underscore the inadvisability of addressing indemnification at this time.

Accordingly, to the extent Petitioner's motion seeks an immediate ruling on the indemnification question, the Court denies that aspect of the motion without prejudice on the grounds that it is premature and seeks an impermissible advisory opinion.

III. CONCLUSION

For the foregoing reasons, Petitioner's Motion to Compel Indemnification, more accurately classified as a request for advancement, is DENIED. IT IS SO ORDERED.

Sincerely,

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[24] See Shearin v. E.F. Hutton Group, 652 A.2d 578 and Hibbert v. Hollywood Park, 457 A.2d 339.

[25] See, e.g., Respondents' Response to Petitioner's Motion to Compel Indemnification.

[26] See 8 Del. C. §145(c) ("To the extent that a present or former director or officer of a corporation has been successful on the merits or otherwise in defense of any action, suit or proceeding...or in defense of any claim, issue or matter therein, such person shall be indemnified against expenses (including attorneys' fees) actually and reasonably incurred by such persons in connection therewith.").

/s/Donald F. Parsons Jr.
Vice Chancellor
Lef

Case No.

IN THE

Supreme Court of the United States

CATHY D. BROOKS-McCOLLUM,

Petitioner(s)

v.

State Farm

Respondent(s)

CERTIFICATE OF SERVICE

I Cathy D. Brooks-McCollum hereby certify that on this ____ day of 2010, I caused and served a true and correct copy of the foregoing Petition of Writ of Certiorari regular postage mail, upon Plaintiffs counsel at their address: Casarino, Christman & Shalk, Stephen P. Casarino, 800 North King St, Suite 200, Wilmington, DE 19899, (302) 594-4500 (telephone), (302) 594-4509 Fax

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